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A

DIGEST OF MOOHUMMUDAN LAW.

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A

DIGEST OF MOOHUMMUDAN LAW

ON THE

SUBJECTS TO WHICH IT IS USUALLY APPLIED BY BRITISH COURTS OF JUSTICE IN INDIA.

COMPILED AND TRANSLATED FROM

AUTHORITIES IN THE ORIGINAL ARABIC,

WITH

AN INTRODUCTION AND EXPLANATORY NOTES.

PART FIRST

CONTAINING

THE DOCTRINES OF THE HANIFEEA CODE OF JURISPRUDENCE.

SECOND EDITION,

REVISED, WITH SOME ADDITIONS TO THE TEXT, AND A SUPPLEMENT ON SALE, LOAN, AND MORTGAGE.

By NEIL B. E. BAILLIE, M.R.A.S.

LONDON:
SMITH, ELDER, & CO., 15 WATERLOO PLACE.
1875.

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In Memory

OF

THE RIGHT HONOURABLE

SIR EDWARD RYAN,

LATE FIRST COMMISSIONER OF THE CIVIL SERVICE COMMISSION, AND FORMERLY CHIEF JUSTICE OF THE SUPREME COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL,

TO WHOM

This Digest

WAS ORIGINALLY DEDICATED

THE PRESENT EDITION IS INSCRIBED

AS A TOKEN OF RESPECT AND ESTEEM

AND WITH GRATEFUL ACKNOWLEDGMENT OF MUCH KINDNESS RECEIVED BY THE AUTHOR DURING AN ACQUAINTANCE OF MANY YEARS IN INDIA AND IN THIS COUNTRY.

Stevens, Jan 18, 1900 $1-4-0

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PREFACE

TO

THE SECOND EDITION.

THE volume which is here presented to the English reader is intended to exhibit the doctrines of the Hanifeea sect on all the subjects to which the Moohummudan Law is usually applied by British Courts of Justice in India. The founder and acknowledged head of the sect was Aboo Huneefa; but his two disciples, Aboo Yoosuf and Moohummud, attained to so great eminence as expounders of his doctrines, that they are usually styled his companions, and their opinions are quoted by his followers as of scarcely less authority than those of the master himself. The Hanifeea is the first, and by far the most numerous of the four Soonnee or orthodox schools of Moohummudan lawyers. Its doctrines are law in the Turkish Empire, and generally throughout the Mussulman countries of Asia, with the exception of Persia, where the Shia is the prevailing sect. The Moohummudan Sovereigns of India were Soonnees of the Hanifeea sect, and the Hanifeea code was the general law of the country, so long as it remained under the sway of Moohummudans. Even in Oude, where the actual rulers were of the Shia persuasion, yet, so long as they preserved a nominal allegiance to the Sovereigns of Delhi, the Hanifeea code remained the law of the province. After the assumption of regal dignity by Ghazi-ood-deen Hyder, the Hanifeea was gradually super-

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seded by the Imameea code, until at length the latter had become the general law of the country at the time of its annexation to the British empire.

At the presidency towns in India, the Moohummudan Law is applicable by Act of Parliament to all suits between Moohummudans, which relate to 'their succession and inheritance,' and, up to the time of the passing of the Indian Act IX. of 1872, it was also applicable by the same Act of Parliament to all suits between Moohummudans which related to 'matters of contract and dealing between them.' In the *Moofussul*, or country separated from or without the presidency towns, it is applicable under regulations of the local governments, to all suits between Moohummudans, 'regarding succession, inheritance, marriage, caste, and all religious usages and institutions; while the judges are expressly enjoined in cases for which there is no specific rule for their guidance, to act according to 'justice, equity, and good conscience.' In practice the Moohummudan law was seldom applied in the presidency towns, even before the passing of the Indian Act, except in cases of marriage and inheritance; but in the *Moofussul*, Moohummudans being more in the habit of regulating their dealings with each other by their own law, to disregard it when adjudicating on such dealings would have been inconsistent with 'justice, equity, and good conscience.' It thus happened, that the *Moofussul* judges were obliged to extend the operation of Moohummudan law beyond the cases to which it is actually applicable, under the regulations of the local governments. The late Sir William Macnaghten, in his valuable work, entitled 'Principles and Precedents of Moohummudan Law,' arranged the cases in which it had been actually applied by these judges under the following heads:—Inheritance; sale; pre-emption; gifts; wills; marriage, dower, divorce and parentage; guardians and minority; slavery; endowments; debts and securities; claims and judicial matters. Many decisions on Moohummudan law

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have been pronounced by courts of justice in India, since the publication of Sir William Macnaghten's book: but none, so far as I am aware, that cannot be reduced under one or other of the same heads. His arrangement, therefore, may still be taken as sufficiently comprehensive to include all the subjects to which the Moohummudan law is actually applied by courts of justice in British India at the present time.

The 'Precedents' in the work referred to are not the decisions of courts of justice, but *futawa* or opinions of their law officers, delivered in answer to questions propounded to them by the judges. They cannot therefore properly be said to be precedents in the same authoritative sense in which the word is applied to the decisions of courts of justice in England. They are entirely omitted in the reprint of the 'Principles,' edited by the late Mr. H. H. Wilson, for the use of candidates for the Civil Service of India.

The authoritative part of the work is thus reduced to a very small compass. It occupies no more than ninety pages of small octavo in the last edition; and half of that space is devoted to the subject of inheritance alone. What remains for the other important subjects—including Marriage, Divorce, and Parentage, on which all courts of justice in British India are bound to administer the Moohummudan law in its integrity—is merely an outline of the law, and scarcely sufficient for elementary purposes.

Soon after the appearance of the 'Principles and Precedents of Moohummudan Law,' I published, in India, a treatise on the Law of Inheritance, derived from the same sources as the 'Principles' of Sir W. Macnaghten, but more in detail and with closer adherence to the original authorities. The only other work on Moohummudan law, according to the Hanifeea code, which was available at that time to the mere English reader, was Mr. Hamilton's translation of the *Hidayah*. Of that work Sir William Macnaghten remarked, that it is 'of little utility as a work

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of reference to indicate the law on any particular point which may be submitted to judicial decision.' This may be going too far; but Mr. Hamilton's work being a translation from the Persian of an intermediate translation in that language, less dependence can be placed upon it than if it had been derived directly from the original in Arabic. Moreover, the English reader may be perplexed by the confusion of text and commentary without the distinctions so carefully marked in the original, and by the frequent references to the opinions of Malik and Shafei, the heads of other sects, who are of no authority with the followers of Aboo Huneefa.

To me it appeared that something more was necessary on the subjects [other than Inheritance] to which the Moohummudan Law was still legally applicable in the Presidency towns, and the judges were in the habit of applying it in the *Moofussul*. And some time after my return to this country, I prepared and published a volume on the Moohummudan Law of Sale, composed of selections from the *Futawa Alumgeeree*, with occasional references to other authorities. The other subjects mentioned in Sir William Macnaghten's list were comprehended in the first edition of this Digest, with the exception of the chapters on Sale, and on Debts and Securities. Sale having been so fully treated in the separate volume referred to, its introduction into the Digest would have been superfluous. For the same reason, it was my intention to have also omitted from it the Law of Inheritance; but that subject was retained at the express desire of the Secretary of State for India in Council, who contributed officially to the expense of the publication. The other chapter on Debts and Securities, had no corresponding title in any work on Moohummudan Law with which I was acquainted. The detached sentences of which it is composed, relate in part to the debts of deceased persons, partly to the joint liabilities of partners and sureties, and partly to pawns and mortgages. The debts of deceased persons

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had been treated at adequate length in my work on the Law of Inheritance. The Moohummudan law, so far as I was aware, had never been applied by any Indian court of justice to the liabilities of partners and sureties, nor to the subject of pawns, and mortgage had been included in my work on Sale. For these reasons, Sale, and the subject of debts and securities, were entirely left out of the first edition of this Digest. My treatise on Sale being now nearly out of print, I have taken the opportunity of remedying to some extent the omission of that subject by a Supplement to the present edition, which I hope may suffice to give the reader some general idea of that important contract. To some this may now seem superfluous, as the Indian Act IX. of 1872, before referred to, contains a chapter on Sale, which is applicable to Moohummudans as well as to the other inhabitants of the country. But the Moohummudans have forms of their own, particularly for the sale of land, which are nicely adjusted to the requirements of their law, and they are not likely to abandon them for some time in their dealings with each other. Moreover, having long exercised supreme authority in India, their law has left its impression on a good many of the customs and institutions of the country ;—the system of Land Revenue, for instance, being wholly founded on it. The time must thus be far distant before the study of their law, even in the branches to which it has never been actually applied, can be safely dispensed with by those who undertake the administration of Justice to a community in which they long enjoyed so great an ascendancy, and of which they still form so large and important a part.

The present work is founded chiefly on the great Digest of Moohummudan Law prepared by command of the Emperor Aurungzebe Alumgeer, and known as the *Futawa Alumgeeree.* For some account of it and the manner of its preparation, the reader is referred to the preliminary remarks to my treatise on the *Moohummudan Law of Sale.* It is sufficient

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to notice in this place that the *Futawa Alumgeeree* is a collection of the most authoritative *futawa*, or expositions of law, on all points that had been decided up to the time of its preparation. Having been compiled in India, and by the authority of a Mussulman sovereign, it is a pity that it was not adopted by the British Government as the standard authority for its courts of civil justice. It was, perhaps, thought too voluminous for translation; and the preference for that purpose was given to the *Hidayah*, which has rendered it necessary to keep that work in view wherever it may seem to differ from the authorities to which the compilers of the *Futawa Alumgeeree* have given the preference. I have not confined my use of it to these points, but have freely quoted from the *Hidayah* and its two celebrated commentaries, the *Kifayah* and *Inayah*, as well as other available authorities, wherever I thought it necessary for a more complete exposition of the law. The translation of the *Hidayah* is also sometimes, though more rarely, referred to under the title of the *Hedaya*, according to the spelling of the word in Mr. Hamilton's title-page.

The extracts of which the *Futawa Alumgeeree* is composed are always given in that work, so far as I have had opportunities of observing, in the words of the original writers. This is the case even when works like the *Hidayah* are quoted, which contain comments and arguments of the writer; though the *futwa*, or decision, is given without the comment or argument. Many of the cases are not likely to occur again, and may be omitted without breaking the continuity of the work, or impairing its general utility. In making my selections from it, I have followed the example of the compilers, insomuch that I have seldom attempted to give the meaning of the original writers in my own words. I have preferred to allow them, as it were, to speak for themselves, and have adhered to literal translation as strictly as the different idioms of the Arabic and English languages would admit. My work

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may thus be deemed, in the three first and eleventh books, an abridged translation of the corresponding books of the *Futawa Alumgeeree*, with occasional extracts from other authorities. The other books are more in the nature of selections from the work generally, though in these also the corresponding books of the original digest have been followed as closely as possible. This has saved the necessity of reference to its pages, except where the extracts are not consecutive. The references to other authorities are perhaps more numerous in these parts of the work than in the books specially mentioned. Even in parts of the work that may be thought more particularly my own, as in the preliminaries to some of the books, and the chapters on Invalid and Void Marriages, Nationality, the Origin of Slavery, Conditions, &c., I have avoided as much as possible speaking in my own person, and never without authority duly referred to; confining myself there, as elsewhere, to the task of translation, after I had made and arranged my extracts. The frequent occurrence of the personal pronouns with inverted commas refer to the sect or country of the original writer of the extract, or to his own opinion, not to the translator. Explanatory foot-notes have been subjoined to the text wherever they appeared to be necessary. Side-notes have also been added, which may, it is hoped, be of some advantage to the reader, not only by abridging the labour of reference, but also by serving as subdivisions of the larger sections of the work. In these an expression of the translator's opinion of the sense of the passage to which they are annexed, and of their connection with the context, is necessarily involved. But this cannot mislead the reader, as he has the text itself to refer to.

The same remark applies to the Introduction which has been prefixed to the work. All the statements of any importance which it contains are accompanied by references to the pages of the text on which they are founded; and the reader will do well to test them by actual comparison before he

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places any reliance on them as authorities. If duly followed up, they may serve, it is hoped, as guides to one who is quite unacquainted with the subject, by opening up for him, as it were, so many paths through an unknown country. To the ordinary Index, which has been arranged so as to form an analytical table of contents, an index of names and other Arabic words occurring in the text has been added. In writing these, no particular system has been strictly followed, though with Dr. Gilchrist I always give to the vowel *u* its sound in the word *us*, and adopt double *o* (*oo*) to signify its other sound. In one respect I may offend the Arabic scholar. The plurals of nouns in that language, though regularly formed from their singulars, appear to one unacquainted with the language to be different words, and by using them I should have been obliged to double the number of foreign terms. To avoid this, no other way occurred to me than that of adopting the sign of the English plural (*s*). The singular word, however, is always given in the Index.

The work has been prepared without any assistance in the selection or translation of the materials of which it is composed; and as these had to be sought for through many a page of authorities in a difficult language, without the aid of anything deserving the name of an index, the circumstance will, it is hoped, have some weight with the candid reader in extenuation of the errors which, notwithstanding the utmost exertions of the author, it may still be found to contain. For these he is alone responsible. But while the first Edition was passing through the press he was indebted for many valuable suggestions, and advice, to his friend, Mr. William Macpherson, Barrister-at-law, and formerly Master in Equity of the Supreme Court of Judicature at Calcutta, to whom he takes this opportunity of renewing his grateful acknowledgments.

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The following abbreviations occur throughout the work:—*Fut. Al.*, for *Futawa Alumgeeree*; *Fut. Ka. Kha.*, for the *Futawa of Kazee Khan*; *P. P. M. L.*, for *Principles and Precedents of Moohummudan Law*, by the late Sir W. Macnaghten, Bart.; *S. D. A.*, for *Sudder Dewanny Adawlut*; and *M. L. S. and M. L. I.* for treatises on the *Moohummudan Law of Sale and Moohummudan Law of Inheritance*, both by the author of the present work.

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INTRODUCTION.

On referring to the classification of Sir William Macnaghten, mentioned in the preface to this work, it will be seen that the cases in which the Moohummudan law has actually been applied in British India are connected with what may be termed the domestic relations of persons to each other, or with the transfer of property *inter vivos*, or from the dead to the living. The first and most important of the domestic relations is that of husband and wife; and it is treated of at adequate length in the three first books of the following work, under the three several heads of Marriage, Fosterage, and Divorce. Marriage is merely a civil contract, and differs in some other important respects from the same contract in this country. A few of these may be noticed in this place. It confers no rights on either party over the property of the other. The legal capacity of the wife is not sunk in that of the husband; she retains the same powers of using and disposing of her property, of entering into all contracts regarding it, and of suing and being sued, without his consent or concurrence, as if she were still unmarried. She can even sue her husband himself, without the intervention of a trustee or next friend; and is in no respect under his legal guardianship. On the other hand, he is not liable for her debts, though he is bound to maintain her, and he may divorce her at any time, without assigning any reason. He may also have as many as four wives at one time. A practice prevails in India which operates as a considerable check on the exercise of these powers of the husband. It is usual for

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Mussulmans, even of the lowest orders, to settle very large dowers on their wives. These are seldom exacted, so long as the parties live harmoniously together; but the whole dower is payable on divorce or other dissolution of marriage, and a large part of it is usually made exigible at any time, so that a wife is enabled to hold the dower *in terrorem* over her husband; and divorce and polygamy, though perfectly allowable by the law, are thus very much in the nature of luxuries, which are confined to the rich. The degrees of consanguinity and affinity within which marriage is prohibited are nearly the same as under the Mosaic law. But under the Moohummudan law affinity may be contracted by illicit intercourse (25), as well as by marriage, and, in some instances, by irregular desires, accompanied by the sight or touch of certain parts of the person (*ib.*) To these grounds of prohibition must be added some that are peculiar to the Moohummudan law. Thus, a man may not marry a woman related to him by fosterage, a prohibition which embraces not only the foster parents, but also all persons related to them within the prohibited degrees of consanguinity and affinity (194). So also, a *Mooslim*, or man of the Mussulman religion, is prohibited from marrying an idolatress, or a fire-worshipper, though he may marry a Christian, or a Jewess (40); and a *Mooslimah*, or woman of the Mussulman religion, cannot lawfully be married to anyone who is not of her own faith (42). A difference of *Dár*, or nationality, may also be classed among the prohibitions of marriage; for, if one of a married pair should happen to change his or her nationality, the marriage between them would be at an end (183). For this and other purposes generally, nations or peoples are held to differ only as they are or are not the subjects of a Mussulman state. Among those who are not the subjects of a Mussulman state, difference of allegiance is recognised as a further difference of countries; but the effect of this distinction is confined to questions of inheritance (708). Moreover, though a Mussulman is allowed to have as many as four wives, he cannot lawfully have two women at the same time who are so related to each other by consanguinity or affinity that, if one of them were a male, marriage

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between them would be prohibited (31). This objection does not apply to his having the women in succession (32); for a Mussulman is not prohibited from marrying the sister of his deceased or divorced wife. Though fosterage is treated of in a separate book for the sake of convenience, the relation has no effect on the condition of the parties between whom it subsists, except that it prevents them from intermarrying.

The principal incidents of marriage are the wife's rights to dower and maintenance, the husband's rights to conjugal intercourse and matrimonial restraint, the legitimacy of children conceived (396), not merely born, during the subsistence of the contract, and the mutual rights of the parties to share in the property of each other at death. The last incident belongs exclusively to valid marriages (694). The right to dower is opposed to that of conjugal intercourse, and the right to maintenance opposed to that of matrimonial restraint. Hence, a woman is not obliged to surrender her person until she has received payment of so much of her dower as is immediately exigible by the terms of the contract (124), and is not entitled to maintenance except while she submits herself to personal restraint (442). Dower, though not the consideration of the contract, is yet due without any special agreement, such dower being termed 'dower of the like,' or 'the proper dower' (91). But when any dower has been specified by the contract, it supersedes the proper dower (93), which in that case comes into operation only on the failure of the specified dower. When dower is expressly mentioned in the contract, it is usual to divide it into two parts, which are termed *mooujjul*, or prompt, and *moowujjul*, or deferred; the prompt being immediately exigible, while the deferred is not payable till the dissolution of the marriage (92).

Marriage, like other contracts, is constituted by *éejab o kubool*, or declaration and acceptance (4). But some conditions are required for its legality; and an illegal, or invalid marriage, though after consummation similar in some of its effects to one that is valid (157), does not confer any inheritable rights on either of the parties to the property of each

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other (694). This seems to be true, not only of contracts that are invalid *ab initio*, but of such also as are rendered so by subsequent acts of either of the parties, as, for instance, by the wife's having carnal intercourse, even against her will, with the son of her husband (281), which would render future intercourse with himself unlawful, and so invalidates the marriage. Where a contract is merely invalid, the legitimacy of children conceived during its subsistence is not affected (157). But when the parties are so nearly related to each other by consanguinity, affinity, or fosterage, that sexual intercourse between them is universally allowed to be unlawful, the contract is altogether futile, or void as to all its effects, according to Aboo Yoosuf and Moohummud, and in their opinion the paternity of the offspring is not established from the husband, or in other words, the children conceived during its subsistence are illegitimate (150). This distinction was denied by Aboo Huneefa, who was of opinion that in all contracts there is such a semblance of legality as saves the marriage from being utterly futile. According to him, therefore, wherever there is a subsisting contract of marriage, the children conceived under it must always be held to be the offspring of the husband (154), unless expressly repudiated by him in the solemn form known as *lián*, or imprecation. There is some reason for giving the preference to the opinion of Aboo Huneefa, particularly in India, where it was adopted by the compilers of the *Futawa Alumgeeree*, who appear to have entirely ignored the distinction between invalid and void marriages (155).

With regard to the dissolution of marriage during the lives of the parties, this is termed *firkut*, or separation; and there are thirteen different kinds of it, or ways in which it may be effected. Of these, seven require the decree of a judge, six do not (205). Separation for a change of nationality, or for apostasy from *Islam*, belong to the second class; and as soon as one of these occurrences takes place on the part of one of a married pair, the marriage between them is *ipso facto* at an end (182, 183). A change to *Islam* belongs to the first class; and when one of a married pair embraces the faith, and the other is within the jurisdiction of a

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Moohummudan judge, their marriage cannot be dissolved until *Islam* has been formally presented to, and rejected by the other (181). Invalid marriages belong to the second class; but though the intervention of the judge is not necessary to set them aside, it is his duty to separate the parties (156) when the illegality of their connection is brought to his notice, and after consummation the marriage cannot be otherwise dissolved without a formal relinquishment by speech. This may be made by either of the parties in the presence of the other. But there is some reason to doubt whether a relinquishment pronounced by one of the parties in the absence of the other, would be valid unless communicated to the other (156).

A *firkut*, or separation, which comes from the side of the wife without any cause for it on the part of the husband (53), or, more generally, every separation of a wife from her husband for a cause not originating in him, is a cancellation of the marriage; while every separation for a cause originating in the husband is termed a *tulák*, or divorce (203). Cancellations differ from divorces in so far that, if a cancellation takes place before the marriage has been consummated, the wife is not entitled to any part of the dower; whereas, though a divorce should take place before consummation, she is entitled to a half of the specified dower, or a present, if none has been specified (96).

Separations for causes not originating in the husband are noticed incidentally as occasion for mentioning them has occurred. Thus, separations under the option of puberty, or for inequality, or insufficiency of dower, which are separations on the side of the wife, are noticed in the fourth and fifth chapters of the first book, in connection with the subjects of guardians and equality. And separations on account of an original invalidity in the marriage, which is a cause in which both the husband and wife participate, are mentioned in the eighth chapter of the same book in connection with invalid marriages. All being cancellations of the original contract, it will be found that in none of them has the wife any right to dower, unless the marriage has been consummated (53, 67, 156).

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Separations for causes originating in the husband, or divorce in its different kinds, forms the subject of the third book. Of these there is one kind of so much more frequent occurrence than the rest, that the term *tulák* is sometimes restricted to it, and the first six chapters of the book are devoted to this kind alone. This class comprises all separations which require the use of certain appropriate language to effect them. And to distinguish them from all other separations originating in the husband, I have given them the name of Repudiation.

Repudiation, or *tulák* in this restricted sense, is either revocable or irrevocable. A revocable repudiation may be revoked at any time until the expiration of the *iddut* (287) or probationary term, usually about three months, prescribed by the law for ascertaining if a woman is pregnant; on the expiration of that term the repudiation becomes irrevocable, and divorce is complete (205). A repudiation may, however, be made at once irrevocable by the force of the peculiar expressions employed, or by pronouncing it three times. A triple repudiation is not only irrevocable, but has this further consequence, that it prevents the parties from re-marrying, until the woman has been intermediately married to another husband, and the marriage has been actually consummated (292); a consequence which in some degree accounts for the strictness with which verbal repudiations are construed.

The words by which repudiation may be given are either plain and express, or ambiguous. The former take effect by the mere force of the expressions, but unless repeated induce only a single repudiation. The latter require intention on the part of the person employing them (212); which is generally determined by the state of mind in which they are uttered (229); and the repudiation effected by them is with a few exceptions irrevocable (231).

Repudiation may not only be pronounced by the husband himself, but the power to repudiate may be committed to the wife, or to a third party. The commission is termed *Tufweez*, and is of three kinds, *Ikhtiyar*, *Amr-bu-yud*, and *Musheeut* (238).

Repudiation may also be contingent, or, as it is termed

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by Moohummudan lawyers, may be suspended on a condition (259). This being a species of *yumeen*, or oath, I have found it necessary to digress a little into the subject of *yumeen* generally, as a preliminary to the chapter on Repudiation with a Condition.

The *yumeen* is of two kinds—by God, and without God. The *yumeen* by God, or an oath in its most proper sense, may be used to confirm an affirmation, or a denial, or an engagement. The oath to confirm an affirmation has no place in Moohummudan law, as witnesses are not required to swear. The oath to confirm a denial is the defendant's oath, which will come under consideration in connection with claims in the last book. The oath to confirm an engagement, as for instance to do or refrain from something, is not legally obligatory on the swearer, though the breach of it must be expiated (261). Much less then, it would seem, is a mere promise obligatory; and I have met with several passages in the *Hidayah* or its commentaries, where a mere promise is treated as nugatory, though I have forgotten the references.

The *yumeen* without God is the *shurt o juza*, or condition and consequence, and it is constituted by the use of the conditional particles if, when, &c.: as when a man has said to his wife, 'If thou enterest the mansion thou art repudiated. To make a good *yumeen* of this kind, the condition must be something in the future that may or may not happen, that is, though possible, not certain; and there must be nothing to prevent the consequence from taking effect immediately on the occurrence of the condition. If the condition is actually in existence, there is no *yumeen*, but an acceleration of the consequence. Thus, when a man has said to his wife, 'If there is a heaven above us, thou art repudiated,' repudiation takes place on the instant (268). Again, if the condition is impossible, there is no *yumeen*, but here the consequence never takes place. Thus, when a man has said to his wife, 'If a camel enter the eye of a needle, thou art repudiated,' there is no repudiation (*ib.*) To secure the following of the consequence on the occurrence of the condition, it is necessary that the power to induce the consequence should continue in

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force up to the time of the occurrence. Thus, if a man should say to his wife, 'If thou enterest the mansion thou art repudiated,' and his power to repudiate were entirely exhausted before the occurrence took place, there would be no repudiation (267). Further, it is necessary that the consequence should be an act that may legally be made dependent on a condition, for if it is not so there is no *yumeen*. Agency, or a licence to trade, is not such an act (260); nor is gift (515); nor is *wukf*, or appropriation (564); nor *rujât*, or retention of a repudiated wife (289). In short, it is stated generally in the *Inayah* that the *yumeen* by *shurt* and *juza* is restricted to emancipation, repudiation, and *zihar*, which is only another kind of repudiation (260). And the *Futawa Alumgeeree* so far agrees with this that the only applications of it given in that digest are to emancipation and repudiation. A contingent gift is void (549), and as bequest is in the nature of a gift deferred till the death of the testator (624), it may perhaps be inferred that a bequest in the same circumstances, and indeed any other act that cannot be legally made dependent on a condition, would, if so made, be void also.

The rules for the proper construction of the *shurt* and *juza*, which are grammatical rather than legal, form the subject of the fourth chapter of the third book. The remaining chapters of the book are occupied with *rujât*, or the retention of a repudiated wife, and the means of again legalizing her to her husband; *eela*, *khoolâ*, *zihar*, and impotency, which are the other kinds of divorce for causes proceeding from the husband; *iddut*, or the probationary period already alluded to, during which it is unlawful for a divorced woman or a widow to enter into another marriage; and *hidad*, or the behaviour in respect of adorning her person, which is becoming to her during that period.

Next to the relation between husband and wife is the relation of parent and child. But as the legal constitution of this relation, or parentage, is founded on the relation of master and slave, as well as on that of husband and wife, slavery comes next in order after marriage, and forms the subject of the fourth book. Domestic service, as distinguishable from the

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general contract of hiring, is hardly known to the Moohummudan law, except in the form of slavery; and I have thought it right to go a little further into the subject than was absolutely necessary as a basis of parentage, though I have not entered into detail to the extent that would have been required if the Indian Legislature had not passed an Act by which slavery has been abolished in almost everything but name. Like sale, it is constantly referred to in treating of other branches of the law; and this circumstance has rendered some explanation of its origin and general conditions almost unavoidable. Parentage, or the constitution of the relation between parent and child, is treated of in the fifth book; and what else relates to them will be found under the heads of guardians in chapter fourth of the first book, maintenance in the sixth book, and the powers of executors in the tenth book. The period of minority is so short under the Moohummudan law, being terminated by puberty in both sexes, that there is not so much to be said of the relation between guardian and ward in Mussulman as in other countries, for instance in England, where minority continues till the age of twenty-one years complete. Of guardians there seem to be two kinds—the lineal and the testamentary guardian. The powers and duties of the former are limited to the marriage of his ward, and those of the latter to the care of his person and property. The testamentary guardian does not appear to be distinguished from the ordinary executor, and some mention of his powers and duties will accordingly be found in the eighth chapter of the tenth book. No executor has authority to contract a minor in marriage, unless he happens to be the lineal guardian also (47). Under the general head of maintenance will be found the duties in that respect of husbands to their wives, parents to their children, masters to their slaves, and relatives within the prohibited degrees to each other. This book includes all that appeared to me to be necessary on the first branch of our subject, or the law of domestic relations.

With regard to the second branch, or the law relating to the transfer of property, property may be transferred *inter vivos* by sale or gift, and from the dead to the living by testate and intestate succession; while it may be settled, without transfer,

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for charitable and other purposes, by *wukf* or appropriation. Sale has been so fully treated of in the volume before mentioned, that anything further on the subject in this work might be deemed superfluous; and it was entirely omitted in the first Edition. But, for the reasons mentioned in the Preface, a Supplement containing some brief notice of the subject has been added to this edition. Consequent on sale, and in immediate connection with it, is pre-emption,—a right so congenial to the habits of the people of India, that it is constantly asserted by Hindoos as well as Moohummudans, and has been recognized by British courts of justice in India, as part of the customary law of the country. It has, accordingly, been treated of at considerable length in the seventh book, before proceeding to the other modes of transfer. These follow in the eighth, ninth, tenth, and eleventh books respectively.

Gift, which is the first in the list, is defined to be 'the conferring of a right of property without an exchange' (515). This may be done either by actual transfer, which is termed *tumleek*, or by extinction of the donor's right, which is termed *iskat* (516). When gift operates by way of transfer, it is not complete without possession, and is in general resumable. When it operates by way of extinction of right, it does not even require acceptance (531), and cannot be resumed (536). For perfect possession, it is necessary that it be taken with the permission of the donor, either express or implied (521), and that the subject of the gift be separated from and emptied of the property and rights of the donor (520). When the gift is of a thing that may be divided without impairing any of its uses, it is further necessary that the subject of it should not be *moosháâ*, or confused with the property of another, by being held in co-partnership with the donor or a third party (523). When an undivided share of a thing, as a half, or a third, or a fourth, is the subject of gift, there is confusion, both on the side of the donor and of the donee, and the gift is unlawful or invalid without any difference of opinion. When two or more persons are jointly possessed of a thing that is susceptible of partition, and combine in making a gift of the whole of it to one person, there is confusion only on the side of the donors, and all are agreed that the gift is

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lawful. Where, again, one person being the proprietor of the whole of a thing makes a gift of it to two or more persons, either equally, or a half to one and a third to another, &c., there is confusion on the side of the donees only, and though the gift is valid according to the two disciples, it is invalid according to Aboo Huneefa. But it is expressly said that the gift is not void, and that it avails to the establishment of property in the donees by possession (524). If so, it would seem that when anything has occurred to prevent the revocation of the gift, it cannot be resumed. The death of the donor is a circumstance that has that effect (534). Yet a gift of the kind last described was set aside by the Sudder Dewanny Adawlut of Calcutta (*Reports*, vol. iv., p. 210), though it had never been revoked by the donor, and she was then dead. There is some reason, however, for thinking that the decision was founded on imperfect information as to the law, since no allusion was made in the *futwa* of the law officers to the distinction above mentioned, nor to any difference of opinion between Aboo Huneefa and his disciples on the point.

Before delivery any gift may be revoked, but after delivery gifts to relatives within the prohibited degrees, or between husband and wife, do not admit of revocation (533, 534). Other gifts may in general be revoked, unless there is some special cause to prevent it. Of the causes that prevent the revocation of gifts, one in particular may be noticed, because it has given a name to a device for effecting a gift of *moosháâ*, or an undivided share in property susceptible of partition. It consists in giving an *iwuz* or exchange for the gift. This may be entirely an afterthought, or may have been stipulated for in the first transaction (541); which in that case is termed a *heba ba shurt ool iwuz* (543), or a gift with a condition for an *iwuz* or exchange. In both cases the *iwuz* is itself a gift, and is valid only when it is something that can lawfully be made the subject of gift. Up to possession, too, the *iwuz* may be revoked, but after that, neither the original gift nor the *iwuz* or exchange for it is resumable. In the second case, there is a further effect, which is that, after possession of the

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iwuz, the two transactions combine, and form an exchange of property for property, which is a sale (*ib.*) But if the exchange is in the original transaction, as when one thing is given in exchange for another, there is a sale from the beginning, as sale may be contracted by the word *give* as well as by the word *sell*. And the transaction, which is termed *heba-bil-iwuz*, has thus become a device in India for giving effect to the gift of *moosháâ* in a thing susceptible of partition (122), which may be lawfully sold, though it cannot be made the subject of gift.

It has been already remarked, that a gift cannot be contingent or suspended on a condition, but it may be made subject to a condition. The original word *shurt*, which is the same in both cases, is thus employed in two distinct senses in the Moohummudan law. In the one it corresponds to the *conditio*, in the other to the *modus* of the civil law. The distinction between them is, that in the first case the condition being essentially future, as already observed, the act, which is made dependent on it, is necessarily suspended until the occurrence of the condition, while in the second case the act, which is made subject to the condition, takes effect immediately, with an obligation on the person benefited by it to fulfil the condition. A condition in this sense may be *fasid*, that is, invalid or illegal, or it may not be so. Any condition inconsistent with the nature of the transaction to which it is annexed, is clearly invalid, as, for instance, a condition in sale or gift of any advantage to the subject of the contract, when there is a person entitled to assert it. But the effect of the illegal condition on the two contracts is different. In the case of sale the contract is overpowered by the condition, and invalidated by it (*M. L. S.*, 199); while in the case of gift, the contract throws off the condition, and remains unaffected by it, the condition itself being void (546). In like manner, marriage is unaffected by an invalid condition, the condition being inoperative (19). If the condition is not invalid, it would seem that it must be observed in gift (547), and probably also in other transactions. What are valid or invalid conditions, must be ascertained from a consideration of the particular transactions to which they are

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attached. But perhaps it may be safe to say, generally, that wherever a condition is inconsistent with something that is requisite to the validity of a transaction to which it is attached, it must itself be invalid, and that where there is no such inconsistency, the condition will generally be valid. What are these requisites will be found in the first or leading chapter of the different books of the following work; and what conditions are valid will also in general be found in some of the subsequent chapters of each book. It may be observed, that what is requisite to a contract or its validity is also termed *shurt*, or condition. This is a third meaning of the word as it occurs in the following pages. And there is even a fourth sense in which the word is employed in Moohummudan law; all deeds or legal documents, such as bills of sale, bonds, &c., being termed *shuroot*, which is a plural of the word *shurt*.

The next head after gift under this branch of our subject is *wukf*, or appropriation. The original word means, literally, *stoppage*, or *detention*, but, as defined in law, it is 'a devoting or appropriating of the profits, or usufruct, of property, in charity on the poor, or other good objects' (557). The property itself is supposed to remain vested in the appropriator, according to one opinion (*ib.*), while, by another, though the appropriator's right abates, it is supposed to abate in favour of Almighty God, and does not pass to a human substitute (558). Appropriation may be constituted by words *inter vivos*, or by bequest. But when it is constituted by bequest, the property which is the subject of it must not exceed one third of the testator's estate, unless the excess is assented to by the heirs (558). The proper subjects of appropriation are lands, houses, and shops, or immoveable property generally, and any moveables that may be attached to it. Moveables, with a few exceptions, cannot by themselves be made the subjects of appropriation (570). With regard to its objects, two conditions are required. There must be some connection between them and the appropriator; and they must be of such a nature that, taken together, they can never fail. The poor are held to answer both these

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conditions, because they are supposed to be connected with everybody, and because 'there will always be poor in the land.' According to Aboo Huneefa and Moohummud, it is necessary that a perpetual succession of objects should be mentioned in the act of appropriation. But this was not required by Aboo Yoosuf, who held that the poor are always to be implied when other objects fail. And his opinion has been preferred, and is said to be valid (566).

One class of appropriations I have designated by the name of 'settlements,' to distinguish them from 'endowments;' which have hitherto been supposed by English writers to be the only proper objects of appropriation. These are appropriations by a person for the benefit of himself, his children, kindred, or neighbours. Thus, a man may settle his land 'on himself, and *after* him, on such an one, and *then* upon the poor;' or he may settle it 'upon himself, and upon such an one' (576). In the former case, the parties indicated take in succession; in the latter, they take simultaneously. Nor does it make any difference, though some of them should follow the others in the order of nature. Thus, if one should say, 'My land is settled on my child, and child of my child,' the two generations participate in the produce (580). So, also, if he should say, 'upon my child, and child of my child, and child of the child of my child,' the produce is to be expended on his children for ever, so long as there are any descendants; the nearer and more remote being alike, unless the appropriator has said, 'The nearer is nearer,' or, 'on my child, then after on the child of my child,' or, 'generation after generation' (580). There is, however, a distinction between the two cases, which it is proper to notice. In the first, where only two generations are mentioned, 'none below them are included,' while in the second, where three generations are mentioned, the produce is to be expended on his children for ever, so long as there are any descendants. A similar consequence seems to follow where the settlement is 'on children;' for there it is said that 'all generations are included on account of the general character of the name' (581) But there is this distinction between the last case and the other two cases, that in the latter, the participation is

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simultaneous, unless there are words of succession, while, in the case of a settlement 'on children,' the whole is to the first generation, while any remains, and so on to the second, third, and fourth, apparently though no words of succession should be employed.

With regard to testate succession, a person cannot dispose of more than a third of his property by will when he has any heir. When he has none besides the public treasury, he may dispose of the whole. To the extent of a third, the heirs have an inchoate interest in his estate from the commencement of any disease that terminates in death. It follows, therefore, that any gratuitous act of a sick person which affects his property, is not valid beyond a third of his whole estate unless he recovers from his illness, or the excess is allowed by his heirs (551). Marriage is not a gratuitous act, and may be contracted in death-illness. But in that case the dower must not exceed the proper dower (651, 694). In like manner a man may repudiate his wife irrevocably during his death-illness (279). But she is entitled to her share of his property at death, unless he survives the expiration of her *iddut* (280). So, also, any act of one of a married pair that invalidates their marriage, is treated as an evasion of the other's right of inheritance, if done in death-illness, and without the other's instigation or participation (281). Acknowledgment of debt is not a gratuitous act; and though a debt should rest on no better foundation than a death-bed acknowledgment, it is valid as against heirs and legatees, but is postponed to debts of health and debts of sickness that have been incurred for known and sufficient reasons, or can be established by other evidence than such acknowledgment (694).

Bequests are valid as far as a third of the testator's property, whether made orally or in writing; and the presence of witnesses is not required in either case as a necessary formality. They are constituted by the words, 'I have bequeathed,' or by any other words commonly used for the purpose (623); but are not completed so as to vest an interest in the legatee without his acceptance after the death of the testator (624). Any person who is free, sane,

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and adult, whether man or woman, is competent to make a bequest (627). And it may be added that a married woman is equally competent to do so with one that is unmarried. So also a bequest may be made to anyone, even to a child in the womb (627). But a bequest to a slave is a bequest to his master (367); and a bequest to an heir of the testator, or to one who becomes his slayer, though only by misadventure, is not valid without the assent of the heirs expressed after the testator's death (625). The individual or individuals to whom a bequest is made may be specially indicated, as by name or otherwise, or only referred to by a general description. In the former case it is necessary that they be in existence at the time of the bequest; in the latter case it is sufficient if they are in existence at the time of the testator's death. Thus, a bequest to a child in the womb is valid only if he is born within six months from the time of the bequest (627); while a bequest to 'the sons of such an one,' who has no son at the time of the bequest, is valid, and takes effect in favour of any who are subsequently born to him before the death of the testator (646).

Anything that is property may be the subject of bequest, though it does not actually belong to the testator, or even if it is not in existence at the time of making his will (624). And the substance of a thing may be bequeathed to one person, and its usufruct, as the produce of land, or the service of a slave, may be bequeathed to another (664), or the usufruct alone may be bequeathed (663), while the substance passes to the heirs. The usufruct may be bequeathed for a limited time, or indefinitely; and when the bequest of it is indefinite, the legatee is entitled to its enjoyment during his life, though the profits should exceed a third of the testator's property (665). Of one kind of usufruct, that is of produce, a bequest may be made to unknown persons, as to the poor generally (667); but it does not appear that any succession of poor persons is intended. And though it is said that an usufruct of any kind may be bequeathed for ever in the manner of a *wukf* or appropriation (652), it is explained to be for the legatee's lifetime. There is therefore nothing to show that, by words of bequest, the usufruct of things, any

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more than their substance, can be granted beyond the lives of persons in existence at the time of the testator's death. I say by words of bequest, because there seems to be no doubt that it may be effected by words of *wukf*, or appropriation, occurring in a will; for it is expressly said that *wukf* or appropriation may be suspended or made dependent upon death, as, when a person has said, 'when I die I have appropriated my mansion to such a purpose,' and that the appropriation is valid and obligatory on the heirs (558). It may, however, be observed in passing, that this is not inconsistent with what has been said before, that emancipation and repudiation are the only acts that can be suspended on a condition; for here, properly speaking, there is no suspension, in the legal sense of the word, the condition (death) being an event that must certainly happen.

An executor may be appointed by words of bequest or agency, and acceptance seems to be necessary in both cases (623, 632). But it is not necessary that the acceptance should be after the testator's death, as in the case of an ordinary bequest; for the acceptance may be during his life (676). If an executor sells any part of the testator's property, after his death, that is equivalent to acceptance. And an executor who has once accepted cannot withdraw from the office after the testator's death (677); though he may be relieved of it by the judge, if he believes himself unfit or over-burdened with business (678), and he may be removed by the judge for malversation (680).

An executor may take possession of the whole of his testator's rights and property, and of the property of any other persons that was in deposit with him at the time of his death (684). He may also exact and receive payment of debts due to him (*ib.*), give directions for his funeral (681), and pay debts and legacies. But if he pays a debt without proof, or pays one creditor in preference to another without the authority of the judge, he is responsible to the other creditors (690); though he may sell a part of the estate to a creditor in exchange for his debt (691). For the payment of debts and legacies an executor may sell the whole of his testator's moveable property, and also so much of the *akár*,

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or immoveable property, as may be required for the purpose. According to Aboo Huneefa, he may sell the surplus of the immoveable property also; but on that point there was a difference of opinion between him and his disciples (690). Yet it would seem that if he actually makes sale of *akár* for the payment of debts, the sale is lawful, though he should have other property in his hands adequate to the purpose (688). The executor may also do whatever is further required for the conservation of his testator's property. But with the powers before mentioned, his proper functions as executor cease. Still he is the representative of his testator, and may do in that capacity with respect to the remainder of the property after payment of debts and legacies, which now belongs to his heirs, whatever the testator himself might have done with respect to the property of the same persons had he been alive. In this way the powers of a father's executor exceed those of a mother's, or any other relative's; and while the powers of a father's executor appear to extend over the whole property of the heirs, whether derived from the father or not, those of a mother's executor seem to be restricted to the property derived from her (689). When there are two or more executors, one cannot take possession of the property or deposits of the deceased, or receive payment of his debts, or apparently dispose of any part of his property beyond the purchase of what may be necessary for his funeral, without the concurrence of the other, though he may make delivery of specific bequests, and pay debts out of assets of the same description as the debts (681). And if one of them should happen to die, his powers do not pass to the survivor, who is incompetent to act alone without the authority of the judge (682).

Of the rules regarding intestate succession or inheritance it is proper to observe, in the first place, that they make no distinction between moveable and immoveable property, and do not recognise the rights of representation and primogeniture. So that a person who would be an heir of another if he survived him, does not transmit any right to his own heirs or representatives, if he dies before the other. But a preference is so far allowed to the male

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over the female sex, that the share of a male is usually double that of a female in the same circumstances (697).

There are three kinds of heirs; *zuvoo'l furaiz*, or sharers, *usubát*, or agnates, and *zuvoo'l urham*, or uterine relatives. The sharers and agnates commonly succeed together; but, as it is only the surplus after satisfying the shares that passes to the agnates, they have been from that circumstance styled 'residuaries.' In like manner, as it is only when there is neither sharer nor residuary, that there is any room for the succession of the uterine relatives, they have been from that circumstance styled 'distant kindred.' It is so seldom that the distant kindred can have any interest in a succession, that they may be left out of consideration in this place.

The sharers are twelve in number; of whom four are males, viz., the husband, the father, the grandfather, and the half-brother by the mother; and eight are females, viz., the wife, the daughter, son's daughter, the mother, the grandmother, the full sister, and the half sister on the father or the mother's side (696). The shares or portions of the estate to which these parties may be respectively entitled, are given in detail in the second chapter of the eleventh book. The residuaries are of two kinds; by descent, and for special cause. The former, of whom only it is necessary to take notice in this place, are the residuary in his own right, the residuary by another, and the residuary with another (701). The first, who is by far the most important, is defined to be 'every male into whose line of relation to the deceased no female enters;' and residuaries of this kind are, first, the lineal descendants, or sons and sons' sons how low soever, then the lineal ascendants, or father and father's fathers how high soever; and, finally, the lineal collaterals and their descendants in the same way, and without any apparent limit (702), the full blood being always preferred to the half; but the half if nearer in degree being preferred to the full when more remote (701).

Of the heirs before mentioned, that is, the sharers and the residuaries by descent, there is an inner circle imme-

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diately connected with the deceased, who are never entirely excluded from the succession, though their portions are liable to reduction in some cases. These are the husband or wife, the father, mother, son, and daughter (705). Of heirs beyond the circle, the grandfather and grandmother are merely substitutes for the father and mother (696, 698), and the remainder are entirely excluded whenever there is a relative within the circle, through whom they are connected with the deceased, or one nearer in degree to him than themselves. These rules, however, are subject to some qualification (703).

When the persons who are entitled to participate in the deceased's succession have been ascertained, the estate is to be divided into so many equal parts as will admit of each person taking his share in a proportionate number of the parts without a fraction. The number of parts into which the estate must be divided, is termed the extractor or divisor of the case. The shares are expressed in fractions, and the denominator of the fraction by which each share is expressed, is the extractor of that share, when it stands alone. But when there are several shares, the lowest sum divisible without a fraction by all the shares is the extractor (718). This rule may suffice when there is only one person entitled to each portion; but when there are several persons entitled to the same portion, it must be equally divided between them, and for that purpose the original extractor must be multiplied by the number of persons, and the product will be the extractor of the case (719). Or, if there is a common measure between the number of parts in which the portion is expressed, and the persons among whom they are to be divided, the original extractor must be multiplied by the quotient of the number of persons divided by the common measure, in order that the fractions may be kept in their lowest terms. The details of these operations are given in the eighth chapter on the computations of shares, in the eleventh book. But a few examples may be given in this place, and they will further serve to illustrate the manner in which the residuaries of different kinds combine with the sharers, and an

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estate is distributed when there are heirs of different descriptions entitled to participate in it.

Thus, let us suppose, in the first place, that the deceased has left a husband, a daughter, and a father. In such a case the share of the husband is reduced to a fourth (699), that of the daughter is a half (697), that of the father a sixth (696), and the extractor being twelve (718), the estate is to be divided into that number of parts. The husband takes a fourth or three of the parts, the daughter a half or six of them, and the father a sixth or two of them, as a sharer; and since there is no son, the father is the 'residuary in his own right,' and takes the remaining share in that capacity. Next, let us suppose that the heirs are the same parties, with the addition of a son. That circumstance does not further affect the husband or the father; but if the daughter's share remained the same as before, the son would have only one share, while the law requires that he shall have double the share of a daughter (697). To meet this exigency, the share of the daughter is merged in or added to the residue, which thus becomes seven parts of the whole. But seven cannot be equally divided without a fraction in the requisite proportions between the son and daughter; and the original extractor twelve must be raised to thirty-six (12×3), which will be found to divide equally among them all. The husband takes his fourth or nine parts (3×3), the father his sixth or six parts (2×3), and the residue or twenty-one parts is divided between the son and daughter, in the proportion of two to one, or fourteen parts to the former, and seven to the latter. The daughter in this case is an example of the 'residuary by another,' being made a residuary by the male who is parallel to her (703). Let us now vary the case by leaving out the father and the son, and substituting for them a brother and sister. The original division into twelve parts will now suffice. The husband and daughter take their shares, or three and six parts respectively, as in the first case, and the remaining three are divisible without a fraction in the due proportion between the brother and sister, the former taking two, and the latter one of them. Once more let us

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again vary the case, by putting a paternal uncle in the place of the brother, and leaving all the other parties as before. Here the paternal uncle is the 'residuary in his own right,' but sisters (full, or half by the father,) are residuaries with daughters or son's daughters (703); and when there are residuaries of different kinds, a preference is given to the residuary who is nearer in blood to the deceased (704). The paternal uncle is accordingly excluded, and the three shares, which in the last case were divided between the brother and sister, are now taken by the sister alone, who is thus an example of 'the residuary with another' (703).

Of the impediments to inheritance, it is only necessary to observe in this place, that the 'difference of religion,' which is one of them, may be original or supervenient. If supervenient, and occasioned by apostasy from the Mussulman faith, it is, perhaps, merged in the higher disqualification (710), and so removed in India by an act of the local legislature (711). But if original, the disqualification is left untouched by that act; and, though an apostate in that country may not be prevented from inheriting to his Mussulman relatives, the benefit would not extend to his children, who, if brought up in his new faith, must, it would seem, be excluded by difference of religion.

Before leaving the subject of inheritance, I may remark that this digest is not intended to supersede the treatise on the same subject alluded to in the early part of this introduction, except in so far as regards the powers of executors and parentage. These matters are more fully treated in the present than in the former work. But as regards inheritance, the former enters more into details than the present, and is, therefore, better adapted to beginners; while, for scholars, it has the further advantage of being accompanied by extracts from the original authorities. The law as stated in both is substantially the same. But it is derived from different sources; the *Sirajiyyah*, and its commentary the *Shureefeea*, on which the former treatise is exclusively founded, never being once quoted, so far as I recollect, in the book of inheritance, contained in the *Futawa Alumgeeree*, from which

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alone my selections on that subject in the present work have been taken.

The twelfth book on the subject of claims and judicial matters completes the work. I have endeavoured to confine myself to so much of the Moohummudan system of procedure as seemed to be necessary for elucidating other parts of the law. More would have been out of place in a work of this kind, as the Moohummudan law of procedure has long been superseded both at the presidency towns and in the *Moofussul*.

Evidence holds a doubtful place between substantive law and procedure. In some cases it seems clearly to belong to substantive law; as, for instance, in the law of parentage, where the testimony of one female witness is sufficient to establish the maternity of a child, or in the English law of treason, where two witnesses are required to each overt act. But cases of this kind are in the nature of exceptions; and whenever a rule is of general application, it seems to belong more rightly to the branch of procedure than to that of substantive law. This distinction, however, has not always been observed. I have therefore found it necessary, when treating of parentage, to digress a little into the general law of evidence, though with the exception of the single case of maternity, the rules which are there referred to are all of general application.

To the book of claims I have appended some examples of judicial proceedings, which are apparently the forms that were in use in India in the reign of the Emperor Aurungzebe Alumgeer. They not only serve to illustrate the law of procedure, including that of evidence, but also show that both were in actual operation at that time. A brief summary of the whole, though at the risk of repeating what has been said elsewhere, may not be an improper conclusion to these remarks, as serving to explain some allusions that are of frequent occurrence throughout the work, and will meet the reader very early in his progress.

The procedure in Moohummudan courts of justice is very simple. The parties appear in person before the judge, and

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the plaintiff states his case orally (737). This must be done in such terms as sufficiently to indicate the subject of claim, the cause of liability, and, if the cause be complicated, the conditions which are necessary to its validity (740). If the statement is satisfactory on these points, the claim is pronounced to be valid, and the defendant must answer by yea or nay. If it is not valid, he is not obliged to answer (738). If the defendant denies the claim, the judge then says to the plaintiff, 'Have you any proofs?' If he says 'No,' he is told that he is entitled to the oath of the defendant; and if he require it, the defendant is called upon to confirm his denial by his oath, with the alternative of judgment being pronounced against him if he refuse (744). If the plaintiff has witnesses he produces them, and requests that they may be examined. Whereupon, the judge directs their evidence to be taken down on separate slips of paper. After which the depositions are read to the witnesses by an officer termed the *Sahib-Mujlis*, or associate of the judge, and they are required to repeat the words of testimony *verbatim* after the judge himself. When this has been done, the proceedings are reduced to writing in the form of a *muhzur* (764). After this, if the judge is satisfied that the witnesses are just or righteous persons, he accepts their testimony, and then gives the defendant an opportunity of offering any *dufâ* or plea he may have in avoidance of the claim, such as satisfaction or release. If he has none, judgment is pronounced against him; and the whole proceedings, including a repetition of the *muhzur*, are recorded in what is termed a *sijil* (766).

When the defendant has a plea in avoidance the same course is to be followed. The parties now, as it were, change places, and the defendant is termed the claimant, and the plaintiff the defendant in avoidance. The plea must be consistent with the denial, or it will be rejected (730). If admitted, the plaintiff must answer by yea or nay; and if the answer is in the negative, the defendant must prove his plea; or, in default of proof, he may call on the plaintiff to confirm his denial by his oath, under the penalty of judgment being given against him if he refuse. The proceedings are reduced to writing as before in the form of a *muhzur* and *sijil* in

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avoidance (768, 769), in the same way as on the original claim. The case does not always stop here; for the plaintiff may reply, and then the same course is to be followed as on the original claim and avoidance.

Such appears to have been the ordinary course of judicial proceedings in India while the country was subject to Mussulman rule. But it might have been shortened by the defendant's adducing his plea in avoidance at once, instead of first denying the claim. This would, of course, render proof on the original claim unnecessary, and confine proceedings to the plea. Sometimes the answer might raise a new issue, and each party might tender proof (760, 761). Here a question would arise, whose proof, or rather whose issue, should be preferred. Some rules for determining the preference will be found in the sixth chapter of the twelfth book. In these cases 'the word' is said to be 'with' the other party, or, as his word may require to be supported by his oath, 'the word and oath' are said to be 'with him' (759).

All evidence, according to the Moohummudan law, must be positive and direct to the point at issue; and in all but a few cases, it is necessary that the witnesses should have actually seen what they attest (418). In these exceptional cases, they are allowed to give their testimony, if they have been informed of the facts to which they testify by trustworthy persons (428), or have seen other collateral facts from which those in question may be legally inferred (424). But in all cases they must make the evidence their own, by positively asserting the fact in issue, and must refrain from saying that they testify to it because they have been informed of it, or because they have seen the other facts from which their inference is drawn; statements, either of which would vitiate the testimony, and oblige the judge to reject it (429). Further, it is required that the witnesses shall be what the law terms just or righteous persons, and free from bias by interest or relationship. They are not sworn (417), nor subjected to cross-examination. But if the character of a witness is objected to, it must be carefully investigated by the judge, and certified to by professional purgators; though if not objected to, the mere profession of the Mussulman faith is usually deemed to be a sufficient warranty

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of character. To be a Mooslim is essential to the character of justice or righteousness. Hence, none but Mooslims can be received as witnesses against a Mooslim (420); though there is a relaxation of the general rule in the case of unbelievers, who, being in this respect all of one religion in the eye of the law, are freely received as witnesses for or against each other. It is further necessary that there should in general be at least two male, or one male and two female, witnesses to the fact in dispute (421), and that their testimony should agree in words as well as meaning; that is, that they should concur in attesting the same thing in the same or synonymous language (420). Finally, evidence is received only to the affirmative of each issue, whether the claim, the avoidance, or the reply. The judge is thus relieved from the perplexity of having to decide between conflicting testimonies. But when the evidence has all the characteristics required by law, it is absolutely binding on the judge, who must receive and act upon the assertion of the witnesses, in the same way as a judge in England is bound to do on the verdict of a jury (417).

These are the leading principles of what was the law of evidence in India for centuries before any part of it passed under British rule. Their effects may still, I think, be traced in the testimony which forms the common staple of *Moofussul* evidence. It is usually direct to the point at issue; and the witnesses, on either side, agree with each other in stating the facts nearly in the same words, and with only such trifling variations as may be required to account for their different means of knowledge. Being bare of circumstances, the evidence presents few points for contradiction, and is rarely shaken in cross-examination. Yet it is very generally believed to be false, and little or no credit is ever given to it by the judges. Its character, however, seems never to change, and is probably the same at the present day as it has always been since the establishment of English courts of justice in India. How shall we account for this? Few facts admit of direct proof, and the people of India know little or nothing of circumstantial evidence, by which alone the deficiencies of positive evidence can be legitimately supplied.

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But any number of witnesses can easily be found to any fact that it is necessary to establish, provided that no regard is had to their character, and an oath is the only test of truth. This appears to me to be the rationale of the whole matter, though I cannot pursue the subject farther here, as it is foreign to the purpose of this Introduction. But I beg respectfully to offer what has been said for the consideration of those who, as legislators or judges, may have anything to do with the administration of justice in India.

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A DIGEST
OF
MOOHUMMUDAN LAW.

PART FIRST.

BOOK I.

OF MARRIAGE.[1]

PRELIMINARY.

What intercourse of the sexes is unlawful.

Intercourse without semblance of legality is *zina*.

THE intercourse of a man with a woman, who is neither his wife nor his slave, is unlawful, and prohibited absolutely.[2] When there is neither the reality nor the semblance of either of these relations between the parties, their intercourse is termed *zina*, and subjects them both to *hudd*,[3] or a specific punishment for vindicating the rights of Almighty God.[4] The *hudd* of *zina* is stoning to death, if the offending party be a *Moohsin*, and scourging if not, with a hundred stripes for one who is free,

[1] *Nikáh.* This is the proper and distinctive name of marriage, though in Bengal it is restricted to what is deemed an inferior kind of marriage, in opposition to *shadee*, which properly means *joy* or *festivity*, but is commonly applied to the first or principal marriage, usually celebrated with festivities and a good deal of expense.

[2] *Hidayah*, vol. ii., p. 586.

[3] *Fut. Al.*, vol. ii., p. 202.

[4] *Hedaya*, vol. ii., p. 1.

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and fifty for a slave.[1] A *Moohsin* is a person who is free, sane, adult, a *Mooslim*, and married by a valid contract that has been actually consummated, to one in whom the same qualities are combined.[2] A *Mooslim* is a believer in the unity of God, and the divine mission of Moohummud.

Semblances are of three kinds.

Knowledge of illegality is a condition essential to the infliction of *hudd*.[3] The punishment, therefore, cannot be inflicted when there is a semblance of right,[4] and it is waived in some cases where the semblance is only imaginary. Semblance is thus of several kinds. First, semblance in the fact, or *shoobh fee'l fiâl*, also termed *shoobh ishtibâh*, or semblance of assumption; which is, when a person supposes that something is a proof of right which is not so in reality; as, for instance, when he imagines that the slave of his wife is lawful to him, because he may make use of her services. But the benefit of this kind of semblance is allowed only with reference to the person who supposes it to exist, and he must claim that he thought the intercourse to be lawful. If he do so, he is exempted from the *hudd*; but otherwise it must be inflicted, because the intercourse is in reality *zina*. Secondly, semblance in the subject, or *shoobh fee'l muhull*, also termed *shoobh hookmee*, because there is some actual proof of lawful right in the woman, though connection with her may, for some reason, be prohibited. Regard is, therefore, to be had to this semblance with reference to all persons, and its establishment is not dependent on the conception of the offender and his claim of legality, for the connection is not positively *zina*. Third, semblance in the contract, or *shoobh fee'l âkd*; and wherever a contract of marriage has taken place, whether it be lawful or unlawful, and whether the illegality be one on which all are agreed, or with respect to which there is some difference of opinion, and whether the party be aware of the illegality

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[1] *Hedaya*, vol. ii. pp. 8, 10, 12. It is hardly necessary to say that these provisions of the criminal law are not enforced in the British territories.

[2] *Fut. Al.*, vol. ii. p. 204-5. [3] *Ibid.*, p. 206; *Hidayah*, vol. ii. p. 586.

[4] *Fut. Al.*, vol. ii. p. 208.

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or not, he is not liable to the *hudd*, according to Aboo Huneefa; but, according to his two disciples, when the marriage is one that is generally admitted to be unlawful there is no *shoobh* or semblance of right, and the party is liable to the *hudd* if he was aware that there is none, though otherwise he would be exempted. It follows, therefore, that in the opinion of Aboo Huneefa, connection under any contract of marriage is not *zina*; and that in the opinion of his disciples, whenever a contract of marriage is universally allowed to be unlawful, connection under it is *zina*. The effect of this difference of opinion will appear when we come to the marriage of persons within the prohibited degrees.[1]

The offspring of a connection where the man has no right nor semblance of right in the woman, by marriage or slavery, is termed *wulud-ooz-zina*, or child of *zina*, and is necessarily illegitimate.

The offspring of *zina* is illegitimate.

[1] *Fut. Al.*, vol. ii. p. 208-9. *Hidayah and Kifayah*, vol. ii. p. 586; and see *Hedaya*, vol. ii. p. 18 and following.

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CHAPTER I.

DEFINITION, CONSTITUTION, CONDITIONS, AND LEGAL EFFECTS OF MARRIAGE.

Definition.

MARRIAGE is a contract which has for its design or object the right of enjoyment, and the procreation of children.[1] But it was also instituted for the solace of life, and is one of the prime or original necessities of man.[2] It is therefore lawful in extreme old age after hope of offspring has ceased, and even in the last or death illness.[3]

Constitution.

The pillars of marriage, as of other contracts, are *Eejáb o kubool*, or declaration and acceptance. The first speech, from whichever side it may proceed, is the declaration, and the other the acceptance.[4]

Conditions.

There are several conditions or requisites of a contract of marriage; among which are the following:—

Legal competency in the contracting parties.

1. Understanding, puberty,[5] and freedom in the contracting parties; with this difference between the conditions, that the first of them is essential, for marriage cannot be contracted by an insane person, or a boy[6] with-

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[1] The first part of the definition is from the *Kanz;* the second I have added from the *Kifayah* (vol. ii. p. 30), the author of which rightly argues that if enjoyment were the sole object or design of marriage, then a temporary marriage, which has nothing else in view, would be lawful; but it is not, as will be seen hereafter.

[2] *Kifayah*, vol. iii., p. 577. [3] *Ibid.*

[4] *Inayah*, vol. ii., p. 2. *Hedaya*, vol. i., p. 72.

[5] The lowest age of puberty, according to its natural signs, is 12 in males and 9 in females: when the signs do not appear, both sexes are held to be adult when they have completed their 15th year. *Fut. Al.*, vol. v. p. 93.

[6] *Subee.* A youth under puberty, which is majority according to Moohummudan law.

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out understanding; but the other two are required only to give operation to the contract, for marriage may be contracted by a boy of understanding, or by a slave, though the contract of the former is dependent for its operation on the consent of his guardian, and that of the latter is in like manner dependent on the consent of his master.[1]

A fitting subject.

2. A fitting subject; that is, a woman who may be lawfully contracted to the man.[2]

Parties to contract must hear each other.

3. The hearing by each of the parties of the words spoken by the other.[3] And if they should contract by means of an expression which they do not understand to signify marriage, still, according to the approved opinion, the contract would be effected.[4]

Presence of witnesses.

4. *Shuhadut*, or the presence of witnesses; which all the learned are agreed is requisite to the legality of marriage.[5] This condition is peculiar to marriage, which is not contracted without the presence of witnesses, contrary to the case of other contracts, where their presence is required, not for contracting, but only with a view to manifestation before the judge.[6]

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[1] *Fut. Al.*, vol. i. p. 467. In the contract of sale there are four kinds of conditions, viz., of constitution, of operation, of validity, and of obligation (*M. L. S.*, p. 1). In marriage the conditions appear to be all of the three first kinds; the fourth in sale depending on options, which have no place in marriage. See *post*, p. 21.

[2] With regard to this condition, including the description of a 'fitting subject,' there was some difference of opinion between Aboo Huneefa and his disciples. See *post*, Chapter of Invalid Marriages.

[3] This is a condition of constitution in sale, and apparently so in marriage.

[4] As if by the mere force of the expression. It is so in sale. The expressions must, of course, be those appropriate to the contract.

[5] The text seems to point to a distinction between legality and constitution; for Malik, the leader of the second of the orthodox sects, required publication only, and not *shuhadut* as a condition. *Hedaya*, vol. i. p. 74.

[6] *Inayah*, vol. ii. p. 1. The author of the *Hidayah* says that *shuhadut* is a condition in marriage, by reason of the saying of the Prophet, 'There is no marriage without witnesses,' but the words 'an essential condition,' which are found in the English translation, do not appear in the printed original; and notwithstanding the abso-

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Qualification of witnesses.

5. There are four requisites to the competency of the witnesses, viz., freedom, sanity, puberty, and *Islam*, or profession of the Mussulman faith.[1] Hence marriage is not contracted in the presence of slaves;[2] and there is no difference in this respect between absolute slaves and *Moodubburs*[3] or *Mookatubs*;[4] nor in the presence of insane persons, nor of minors, nor of infidels, when the marriage is between *Mooslims*. If the husband be a *Mooslim* and the wife a *Zimmeeah*,[5] their marriage may be contracted with two *Zimmees*[6] for witnesses, whether they be of the same or a different faith from the wife. And the *Islam* of the witnesses is not a condition to the marriage of two infidels; for marriage between them may be contracted with two infidels for witnesses, whether they agree with, or differ from, the parties in religion. Marriage is valid when contracted in the presence of two profligates, or two blind persons.[7] So also of two persons who have undergone the *hudd* or specific punishment for slander, or for *zina*.[8] It may also be contracted with persons for witnesses whose testimony in other cases could not be received in favour of the parties; as for instance, the sons of one of them. There must, however, in all cases, be more than one witness; but it is not necessary that all the witnesses

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lute terms of the Prophet's saying, the condition seems to have become one of validity only, and not of constitution. See *post*, Chapter of Invalid Marriages.

[1] These qualities are essential to a literal compliance with the condition, for without the three first no person can be a witness in any case, and the last is equally necessary when testimony is to be given against a Mussulman.

[2] That is with only such persons as witnesses.

[3] Slaves who are to be free at their master's death.

[4] Slaves who have entered into an agreement with their master for freedom on payment of a ransom.

[5] Feminine of *Zimmee*.

[6] Male infidel subjects of a Mussulman State.

[7] These are disqualified in other cases. Shafei, the leader of the third of the orthodox sects, differed with regard to profligates (*fasik*), thinking that the witnesses should in this, as in other cases, be just persons. *Hedaya*, vol. i. p. 74.

[8] Disqualified in other cases.

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should be males, for marriage may be contracted with one man and two women for witnesses;[1] but not with women only without a man.

They must hear what is said by the contracting parties.

It is further a condition of marriage that the witnesses shall hear the words of both the contracting parties together. Hence it cannot be contracted[2] in the presence of two sleepers who have not heard the words of both the contracting parties, nor of two persons so deaf that they cannot hear: but the objection does not extend to a person who is dumb or tongue-tied, if he can hear.[3] If the witnesses should hear the speech of one of the parties, and not that of the other, or if one of the witnesses should hear the speech of one of the parties, and the other that of the other, the marriage is not lawful. So also, if both the witnesses should hear both the parties, but hear them separately, as for instance, if the marriage should first take place in the presence of one of the witnesses, and should then be repeated in the presence of the other, who was absent on the first occasion, it would not be valid.[4] And if it should take place in the presence of two men, one of whom is partially deaf, and if the hearing witness should hear, but not the one who is partially deaf, and the former, or a third party, should then call aloud the words in the ear of the latter, the marriage would not be lawful until they both hear the contracting parties at once.

And should understand what is said by them.

If two persons hear the words of the contracting parties, but do not understand their meaning, it has been said that the contract is valid; but apparently it should be the contrary, and there is a report of Moohummud, that when a man married in the presence of two Turks or two Hindoos, he said, that if the witnesses can explain what they heard the contract is lawful, but otherwise not so.[5] Is it then a condition that the witnesses shall understand the contract?

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[1] Shafei differed on this point also, deeming the testimony of females inadmissible except in cases relating to property.

[2] That is, lawfully, so as to make a valid marriage. See note 6, p. 5.

[3] Disqualified in other cases. [4] *Shurhi Vikayah*, p. 106.

[5] The contract is supposed to be in Arabia.

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It is said in some *futawa*, or decisions, that regard is to be had to hearing without comprehending; so that if one should marry with *Ajumees*, or Persians, for witnesses, the contract would be lawful; but Zaheer has said (and apparently he is right) that their comprehension of the contract is also a condition, and this is correct.[1] But though the witnesses were drunk, and had no recollection of the transaction when they became sober, yet if they apprehended the matter at the time, marriage is contracted. In the *Futawa* of Aboo Leeth, it is stated that if a man should address several persons, saying, 'Bear witness that I have married the woman who is in this house,' and the woman should answer, 'I have accepted,' and the witnesses should hear her speech without seeing her person, and she were alone in the house, the marriage would be lawful; but not so if there was another woman in the house with her at the same time. A person marries his daughter to a man in a house, and there are several persons in another house who hear the transaction, but are not called upon to bear witness to it, yet if there be an opening between the houses through which the persons can see the father, their testimony will be accepted, but otherwise not.

But need not see the woman.

A woman appoints a man her agent to marry her to himself, and the agent says in the presence of witnesses, 'I have married such an one,'[2] the witnesses being ignorant who the such an one is; the marriage is not lawful unless her name, and the names of her father and grandfather, be mentioned. But if the woman be actually present, though veiled and unknown to the witnesses, the

When absent, she must be properly identified to the witnesses.

[1] Two authorities are cited; and it may be observed, with reference to what has been said as to the parties themselves not comprehending the words of contract, that the difference with regard to the witnesses may arise from the manner in which their testimony is given, which is not to the words spoken, but to their effect, as, for instance, that the parties *did marry*, or *are man and wife*, involving a judgment of the mind.

[2] In contracting marriage it is lawful for one person to represent both sides. Here the party acts as agent on one side and principal on the other.

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marriage is lawful. It would, however, be a proper precaution to uncover her face, that the witnesses may see her, or to mention her name and the names of her father and grandfather. If the woman be known to the witnesses, though absent, and the husband mentions her name only, the witnesses understanding him to intend the woman with whom they are acquainted, the marriage is lawful.

Miscellaneous cases relating to witnesses.

A person directs a man to contract his infant daughter in marriage, and he contracts her before another man and the father himself, who is also present, the marriage is valid; but it would not be so if he were absent. It has been said that when a man contracts his virgin adult daughter in marriage by her own desire, and in her own presence, and where, besides the father himself, there is another witness, the marriage is valid; but that it would not be valid if the lady were absent.[1] And if a person should appoint an agent to contract his male slave in marriage, and the agent should do so in the presence of one man or two women, the slave himself being present, the marriage would not be lawful.[2] When a person has permitted his male slave to marry, and the slave marries in the presence of his master, with one man for a witness besides his master, the contract ought to be lawful, according to 'our' doctors.[3] And if a man should contract his adult male slave in marriage to a woman in the presence of one man and of the slave himself, the contract would be valid; but if the slave were absent the marriage would not be lawful. And the rule is the same with regard to a female slave;[4] but Moorghenanee has said that it is not lawful. Of this class of cases is that

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[1] The lady being adult, and *sui juris*, may herself be supposed to be the contracting party.

[2] The slave is not *sui juris*, and therefore is incapable of being the contracting party.

[3] The slave is here the contracting party, being *sui juris* for the occasion, by reason of his master's permission.

[4] In these cases also the slave must be considered the contracting party, for freedom is essential to the competency of a witness. See *ante*, p. 6.

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mentioned in the Mujmooa Nuwazil, of a woman who appointed a man her agent to contract her in marriage to a particular person, and he did so in the presence of two women, the principal herself being also present, and the *Imam* Nujum-ood-deen was of opinion that the marriage was lawful.

Time at which their presence is required.

The time when the presence of the witnesses is required is the time of the declaration and acceptance, not the time of the allowance of the contract; so that if a contract be dependent on the permission of a party, and the witnesses were not present at the time when the contract was entered into, it would not be lawful.

They must be human beings.

A man marries a woman calling on God and his Prophet to bear witness; the marriage is not lawful.

Woman's consent necessary.

6. The consent of the woman is also a condition, when she has arrived at puberty, whether she be a virgin or *suyyib*,[1] that is, one who has had commerce with a man; so that, according to us, a woman cannot be compelled by her guardian to marry.

The declaration and acceptance must be expressed at the same meeting.

7. The declaration and acceptance must both be expressed at one meeting;[2] and if there be any change of the meeting, as, for instance, if both the parties being present, one of them should make a declaration, and the other should then rise from the meeting before the acceptance, or should take to some other occupation which would occasion a change of the meeting, there is no contract. In like manner, when one of the parties is absent, there is no contract; so that if a woman should say in the presence of two witnesses, 'I have married myself to such an one who is absent,' and the person referred to should, on the information reaching him, say, 'I have accepted;' or if a man should say, in the presence of

[1] *Thuyyibah* in the first edition, as pronounced in Arabic, and with the feminine termination; now struck out, as it is not found in the original. The word being always opposed to virgin, there is no doubt as to its meaning.

[2] Literally *place of sitting*. See as to unity of the place of meeting, *M. L. S.*, pp. 4, 12. According to the analogy of sale, this seems to be a condition of constitution.

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two witnesses, 'I have married such an one who is absent,' and the woman referred to should, on the information reaching her, say, 'I have married myself to him;' it would not be lawful in either case, even though the acceptance were expressed in the presence of the same witnesses. This was the opinion of Aboo Huneefa and Moohummud. But if he should send her a message or write her a letter, to the same effect, and she should declare her acceptance in the presence of two witnesses who have together heard the words of the messenger or the reading of the letter, the contract would be lawful by reason of the unity of the meeting in spirit; while if the witnesses should not have heard the words of the messenger or the reading of the letter, the contract would not be lawful, according to Aboo Huneefa and Moohummud, though Aboo Yoosuf differed from them in this respect. And though, on receiving and reading the letter, she should not immediately contract herself to him at the same meeting, but should afterwards do so at another meeting in the presence of two witnesses who have heard her words and the contents of the letter, the marriage would be lawful. And if she should say, 'Such an one has written to me asking me in marriage, bear ye witness that I have married myself to him,' the marriage would be valid, because the witnesses hear her words in her declaration of the contract, and they also hear the words addressed to her in her repetition of them. It makes no difference whether the messenger be free or a slave, a minor or adult, just or unjust, for he merely conveys the expressions of the sender.

When the declaration is conveyed by message or letter.

How the unity of the meeting is preserved.

If the parties contract while walking together, or riding together, the contract is not lawful;[1] but if they are both in a boat which is in progress the contract is lawful.

Case of parties in motion.

8. It is not a condition with us that the acceptance should immediately follow the declaration; but it is a

Acceptance must conform to

[1] The words 'on a beast' (*dabbuh*) are added in the original, but it is implied, I think, that the parties are not riding on the same animal. See *M. L. S.*, p. 13.

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the declaration.

condition that the acceptance should not vary from the declaration; so that if one person should say to another, 'I have married to you my daughter for a thousand *dirhems*,' and the other should answer, 'I have accepted as to the marriage, but do not accept as to the *muhr* (or dower),'[1] the contract would be null; but if he should say, 'I have accepted the marriage,' and should remain silent as to the dower, marriage would be contracted between them.

Reference to the whole person necessary.

9. It is also a condition that the marriage be referred to the whole of the woman's person, or to what implies the whole, as the head or neck, contrary to the hand or foot; and if it be referred to her back or belly, our doctors, according to the report of Hulwaee, have said that it is more in accordance with the tenets of our masters to hold that marriage is contracted.

Husband and wife must be identified.

10. It is further a condition that the husband and wife shall both be known or identified; and if a man, having two daughters, should give one of them in marriage, saying only 'his daughter,' the contract would not be valid unless one of them were already married, when it would be deemed to have reference to the unmarried one. It has been said that a female slave known in her childhood by one name, and by another when she had grown up, should be married in the last name, if known thereby; it would, however, be more proper to join both the names. A person having only one daughter called Fatimah, says to another, 'I have married to you my daughter Ayesha,' without pointing to her; there is no marriage according to the Futawa al Fuzlee; but if he had said merely 'my daughter,' without any addition, the marriage would be lawful. A man having two daughters, the eldest of whom is named Ayesha, and the younger Fatimah, and intend-

[1] 'The gift of a husband for a wife. "Ask me never so much *dowry* and gift." Gen. xxxiv.' (Webster). 'Dowry, a different spelling of dower, but less used.' (*Ibid.*) The original word is the same in the Hebrew as in the Arabic language, but it seems that among the Jews the *muhr* was given to the father or kindred of the wife, while among Mussulmans it is the right of the wife herself.

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ing to marry the elder, contracts her in the name of Fatimah, the marriage takes effect as to the younger; while if he had said, 'I have married my elder daughter Fatimah' there would be no contract as to either. When the father of a young girl has said, 'I have married my daughter such an one to the son of such an one,' and the person referred to has answered, 'I have accepted for my son,' without naming him, the contract is not lawful if he has two sons, and valid if he has only one. And if the girl's father should have named the son by saying, 'I have married my daughter to thy son such an one,' and his father should have said, 'I have accepted,' it would be valid.

If the father of the girl should say to the father of the boy, 'I have married my daughter,' without further addition, and the father of the boy should say, 'I have accepted,' the marriage would take effect as to the father himself. This is approved; and is correct.

Legal effects of marriage.

The legal effects of marriage are as follows:—It legalizes the mutual enjoyment of the parties in a manner permitted by law or according to nature. It subjects the wife to the power of restraint; that is, it places her in such a condition that she may be prevented from going out and showing herself in public. It imposes on the husband the obligation of *muhr* or dower, and of maintaining and clothing his wife. It establishes on both sides the prohibitions of affinity and rights of inheritance. It obliges the husband to be just between his wives, and to have a due regard to their respective rights; while it imposes on them the duty of obedience when called to his bed, and confers on him the power of correction when they are disobedient or rebellious. It enjoins on him the propriety of associating familiarly with them with courtesy and kindness. And it forbids him to associate together, either as wives or concubines, two women who are sisters, or so connected with each other as to render their association unlawful.

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CHAPTER II.

HOW MARRIAGE IS CONTRACTED.

Marriage is contracted by spoken words.

MARRIAGE is contracted by declaration and acceptance, when both are expressed in words of the past,[1] or when one of them is expressed in the past and the other in the imperative or the present. So that when a man has said to a woman, 'I marry thee for this,' and she has said, 'I have accepted,' the contract is complete, even though he should not reply, 'I have accepted.' And if he should say, 'Marry thyself to me,' and she should accept, the contract is effected, provided that he did not intend a future time by the expression.[2]

But expressions in the imperative form, such as 'Marry me,' or 'Marry thyself to me,' or 'Be thou my wife,' are not, properly, declarations, but appointments of agency; and when they are answered at the same meeting by other expressions, such as 'I have married,' or 'have accepted,' or 'hearing and obeying,' the latter serve for both sides, and include both the declaration and the acceptance.[3]

As marriage is contracted by speech, so also it may be contracted, in the case of a dumb person, by signs, when the signs are intelligible. But it is not contracted by

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[1] There are only two tenses in the Arabic verb, the preterite and the aorist. The latter being employed to express present and future time, is ambiguous, and the preterite is commonly used in contracts, for, though its proper function is to relate the *past*, it is employed in law in a creative sense, to meet the necessity of the case.—*Hedaya*, vol. i., p. 72.

[2] The imperative is supposed by Oriental grammarians to be necessarily referable to future time.—*Lumsden.*

[3] *Doorr-ool-Mookhtar*, p. 190.

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taatee, or mutual surrender;'[1] nor by writing between parties who are present; so that if the man should write, 'I have married thee,' and the woman should write, 'I have accepted thee,' there is no contract.

But not in writing between present parties.

The words by which marriage is contracted are of two kinds; *sureeh*, or plain, and *kináyát*, or ambiguous. The *sureeh*, or plain, are *nikáh* and *tuzweej*. All the others are *kináyát*, or ambiguous, and they comprehend every word that is employed to effect an immediate ownership in a specific thing. Thus, marriage is contracted by *heba*, or gift, *tumleek*, or transfer, and *sudkut*, or alms. So also by the word *beyâ*, or sale; as if a woman should say, 'I have sold myself to thee,' or a father should say, 'I have sold my daughter to thee for so much.'[2] And in like manner it is contracted by the word *shira*, or purchase; as if a man should say to a woman, 'I have bought thee for so much,' and she should make answer by 'yes.'[3] And if a man should say to a woman, 'Thou art mine,' or 'hast become mine,' and she should answer 'yes.' So also if he should say, 'Be my wife for a hundred,' or 'I have given you a hundred that you may be my wife,' and she should accept, it is a marriage. If a woman irrevocably repudiated should say, 'I have restored myself to thee,' and the husband should answer, 'I have accepted,' in the presence of witnesses, that is a marriage. So also if a man, after he has repudiated his wife three times, or irrevocably, should say, 'I have recalled thee on so much,' and the woman is content, and the transaction takes place in the presence of witnesses, it is a valid marriage; and it would be so even though no mention were made of any property, provided that both parties are agreed that the husband intended marriage. But if the same words were addressed to a stranger, and the woman should consent, there would be no contract.

By what words it may be contracted.

Marriage is not contracted by the words *ijarut*, or hiring, *iârut*, or lending, *ibahut*, or permitting, *ihlal*, or le-

Words by which it

[1] A mode of effecting sale.

[2] *Hidayah and Kifayah*, vol. ii., p. 4.

[3] *Ibid.*

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cannot be contracted.

galizing, *tumuttooâ*, or enjoying, *ijazut*, or allowing, *ruza*, or being content, and the like. Nor by the words *soolh*, compounding, and *buráut*, releasing; nor the words *shirkut* or partnership, and *îtak*, emancipating; nor by the word *wuseeut*, bequeathing; for though that is a cause of property, its effect is postponed till after death.

Difference of opinion as to certain other expressions.

There is some difference as to the words *kurz*, or lending,[1] and *ruhn*, or pledging; but the sound opinion is that which negatives the contract. It has been said, however, that the contract of marriage may be effected by means of the word *kurz*, according to the analogy of the doctrines of Aboo Huneefa and Moohummud; for with them the inherent meaning of *kurz* is an exchange of property for property,[2] which is the definition of sale; and this has been approved. With regard to the word *sulum*, or advance, which is also a kind of sale, it has been said by some that it is sufficient to effect the contract of marriage, but by others that it is not sufficient. And there is the like difference of opinion with regard to *surf*, which is likewise a sale.

Miscellaneous cases.

A woman says to a man, 'I have married myself to thee,' intending to add 'for a hundred *deenars*,' but before she can utter the words he answers 'I have accepted;' marriage is not contracted. A man sends a party of persons to another to solicit him for his daughter, and they say in Persian, 'Hast thou given thy daughter to us?' and he answers, 'I have given,' whereupon they reply, 'We have accepted;' but this is no contract of marriage for want of reference to the suitor. A man and woman acknowledge a marriage in the presence of witnesses, saying in the Persian language, 'We are wife and husband,' but marriage is not thereby contracted between them, and this is approved. And if he should say, 'This is my wife,' in

[1] The distinction between this word and *iárut* on the preceding page is the same as between the *mutuum* and *commodatum* of the Roman law; the obligation of the borrower being to return a *similar* of the thing lent in the former case, and the actual thing itself in the latter.

[2] See *M. L. S., Introduction*, p. xli.

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the presence of witnesses, and she should say, 'This is my husband,' there never having been any marriage between them, the correct view, notwithstanding some difference of opinion upon the subject, is that this would be no marriage[1] —unless judicially pronounced to be a marriage, or the witnesses should say to the parties, 'Have you made this a marriage?' and they should answer, 'Yes;' when, according to the approved doctrine, as stated in the Shurh-ool-Jussas, it would be a marriage. Alee-as-Soghdee having been asked concerning a man who saluted a woman, saying '*Salaam uleki* (peace be to thee) O my wife,' whereupon she answered, 'And to thee *salaam*, O my husband' (the words being heard by two witnesses), said that there was no contract. When a person says to the father of a girl, 'Hast thou married thy daughter to me?' and he answers 'I have married,' or 'Yes,' there is no marriage until the man say after this, 'I have accepted;' for his first words, 'Hast thou married to me?' are merely interrogative.

Of *Moozâf* and *Mooâlluk*, or future and dependent marriages.

The reference of marriage to a future time, and its suspension on a condition, are not valid.[2] A *Moozâf* marriage, therefore, or one which is so referred, as if a person should say, 'I have married thee to her to-morrow,' is not valid; but a *Mooâlluk*, or dependent marriage, is valid where the dependence is on an event already passed, for its state may be ascertained. Hence, if a person whose daughter has been asked in marriage should falsely inform the applicant that he had already married her to such an one, and should say, 'If I had not married her to him I would have married her to thy son,' and the father of the son should thereupon accept in the presence of witnesses, and it should subsequently transpire that the daughter had not been married to any one, this would be a valid marriage. But if a person should say to a woman, in the presence of witnesses, 'I have married thee for so much, if

[1] The declaration would apparently be sufficient to constitute marriage according to the Law of Scotland.—*Bell's Principles*, § 1514.

[2] *Doorr-ool-Mookhtar*, p. 196.

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my father permit,' or 'be satisfied,' and she should answer, 'I have accepted,' there would be no valid marriage.

Of *Mootâ* or usufructuary marriage.

A *Nikâh-i-Mootâ*,[1] or usufructuary marriage, is *batil* or void, and is not susceptible of repudiation, nor of *Eela*,[2] nor *Zihar*,[3] neither does either of the parties to it inherit from the other. This is a *Mootâ* when a man says to a woman free from any cause of prohibition, 'I will take the enjoyment of you for such a time,' as ten days for instance, or 'for days,' or 'Give me the enjoyment of your person for days,' or 'ten days,' or without any mention of days 'for so much.'[4]

Of *Moowukkut*, or temporary marriages.

A *Moowukkut*,[5] or temporary marriage, is void;[6] and it makes no difference whether the time be long or short, according to the most valid opinions, nor whether it be known or unknown. Hulwaee and many of the learned of 'our' sect have said that if the time mentioned be certainly beyond the period of human life, as a thousand years, for instance, the contract takes effect, and the condition is void; in the same way as if a man should marry a woman till the end of time, or the going out of Antichrist, or the

[1] Literally, 'a marriage of enjoyment.' The word *mootâ* enters into the definition of marriage; and is the root of *tumuttooa* by which it has been already seen that marriage cannot be contracted.

[2] Swearing not to cohabit with a wife for four months, if a free woman, or two, if a slave; by which means, if the vow be kept, divorce is induced.

[3] A husband likening his wife to the back of a female relative within the prohibited degrees.

[4] Malik deemed this marriage to be lawful, as it was once permitted by the Prophet, and the permission was never abrogated in his opinion. Aboo Huneefa, however, held the assent of all the companions to be sufficient proof of abrogation, and farther, that the permission itself was only for a particular occasion, and limited to a few days. See *Hidayah and Kifayah*, vol. ii., p. 29.

[5] With what remains of this chapter I have mixed up some cases that, in the original, are placed in a sub-section at the close of the next chapter, but appear to me to be more immediately connected with the subject of this.

[6] The reason assigned for this is that it can be for no other purpose than mere enjoyment, and therefore falls within the prohibition of *mootâ* marriages, from which they differ only in the words of constitution.—*Kifayah*, vol. ii., p. 30.

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descent of Jesus Christ, and Husn has reported to that effect as from Aboo Huneefa. Surukhsee has recorded that when a woman marries for a thousand till the harvest, or the treading out of the corn, there is a difference among the learned as to the point, but the approved doctrine in my opinion[1] is that the contract is effected, and the period to be construed as having reference to the *muhr* or dower.

Marriages with conditions.

When an illegal condition is annexed to a marriage, the contract is not cancelled by it, but the condition itself is void, leaving the marriage unaffected; contrary to the case of a marriage dependent on a condition, which, as already observed, is not valid.[2] If a man should marry a woman absolutely, but with the intention of remaining with her only for a certain time, the marriage would be valid. Or if he should marry her on a condition that he will repudiate her after a month, still the marriage would be lawful. And there is no objection to marrying a woman as a *Nuhuriyyah*, that is, on the terms of sitting with her by day and not by night. A man marries a woman on[3] condition that she is repudiated, or that her business as to repudiation is in her own hands; Moohummud has said, with regard to such a case, that the marriage is lawful, but the word 'repudiated' (*talik*) is void, and that the business is not in her hands. The lawyer Aboo Leeth, however, has said that this is so only when the husband has taken the initiative, and said, 'I have married thee on condition that thou art repudiated;' but that when the initiative is on the part of the woman, who says, 'I have married myself to thee on condition that I am repudiated,' or 'that the business is to be in my hand to repudiate myself when I please,' and the husband says, 'I have accepted,' the marriage is lawful, and repudiation takes effect, or is in her power, as the case may be. And in like manner, when a master marries his female slave to his

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[1] The opinion is probably that of the authority cited.

[2] *Doorr-ool-Mookhtar*, p. 196.

[3] *On* does not mean dependence, which would require *if* or some such word. See *post*, Book III., Chap. IV., Section First.

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male slave, if the latter should commence and say, 'Marry this your slave to me for a thousand on the condition that the matter is to be in your hands, to repudiate her whenever you please,' and the master then marries her to him, the marriage is valid, but the business or power of repudiation is not in the master's hands; while if the master should commence and say, 'I have married to thee my female slave on condition that her business is to be in my hands to repudiate her whenever I like,' and the male slave should say, 'I have accepted,' the marriage would be lawful, and the business in the master's hands. And if the male slave should say to his master, 'When I have married her, her business is then in your hands for ever,' and he should thereupon marry her, the business would be in the master's hands, and could never be taken out of his hands.

Pilgrims may intermarry.

It is lawful for a *Moohrim* and *Moohrimah*[1] to intermarry while in the state of *Ihram*.[2] So, also, a *Moohrim* guardian may lawfully contract or give his female ward in marriage.

Effect of a judicial decree in constituting marriage.

A man that is sued in marriage by a woman who produces evidence against him, and is made or declared to be his wife by a decree of the judge, may lawfully take her to live with him, though in point of fact he had never married her; and he may have connection with her if solicited to that effect, according to Aboo Huneefa, and the first opinion of Aboo Yoosuf; but, according to the second opinion of Aboo Yoosuf, which was also that of Moohummud, he is not at liberty to have connection with her. Aboo Huneefa thus gives a creative effect to a decree; but for that purpose it is necessary that the woman should be legally competent to enter into the contract; for, if the woman were actually the wife of another, or in her *iddut* (or term of probation[3]) for another, or had been thrice repudiated by the man himself, the judge's decree would not be operative. And it is a necessary condition that witnesses

[1] Male and female pilgrims to Mecca.

[2] That is, while on pilgrimage; after putting on the pilgrim's dress.

[3] After death or divorce, to ascertain if she be pregnant.

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should be present at the time of the decree, according to all our masters. In like manner, if a man should sue a woman in marriage, the effect would be the same. So also, if a decree were pronounced for a divorce on false testimony with the woman's knowledge, she might lawfully intermarry with another husband after the expiration of her *iddut*, and even the witness might lawfully marry her, and she would become unlawful to her first husband. According to Aboo Yoosuf, neither the first nor the second could lawfully have connection with her; but, according to Moohummud, her first husband might lawfully have such connection until consummation with the second, when further connection with the first would become unlawful from the necessity of observing an *iddut*, and with regard to the second, it would never be lawful for him to have connection with her. A man sues a woman in marriage, and she denies the claim, but he enters into a composition with her for a hundred *dirhems*, on condition of her acknowledging the suit, and she does so; the sum agreed upon is binding on him, and her acknowledgment is instead of a new contract. If, then, it take place in the presence of witnesses, the marriage is valid, and she may live together with him, as between her and her lord; but if not, marriage is not contracted, and she cannot lawfully live in the same place with her husband.

Marriage is not subject to option.

The options[1] of inspection, defect, or stipulation have no place in the contract of marriage, whether the option be given to the husband or the wife, or to both, and whether it be for three days, or less or more; so that if the stipulation were made the marriage would be lawful and the condition void. There is an exception, however, in the case of defect, when the husband is an eunuch of either kind, or impotent; and the woman has an option according to Aboo Huneefa and Aboo Yoosuf. When one of the parties

[1] Option is a power of cancellation, which may be reserved to either party in a contract of sale by express stipulation, and is allowed without stipulation to a purchaser who buys a thing which he has not seen, or which proves to be defective. See *M. L. S.*, chapters vi., vii., and viii.

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stipulates with the other for freedom from blindness, paralysis, or the exhaustion of old age, or for the quality of beauty, or the husband stipulates for virginity in the wife, and the fact proves to be the contrary of what was stipulated for, still the party has no option. A man marries a woman under a condition that he is a citizen, and he proves to be a villager, the marriage is lawful if he be her equal, and she has no option. And in the Futawa of Aboo Leeth, there is a case of a man who married a woman under a condition that her father should have an option, and the marriage was held to be valid without the option.

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CHAPTER III.

OF WOMEN WHO ARE UNLAWFUL OR PROHIBITED—OF THESE THERE ARE NINE CLASSES.

Class First,

Or such as are Prohibited by reason of Nusub or Consanguinity.

Prohibition for consanguinity.

These are mothers, daughters, sisters, aunts paternal and maternal, brothers' daughters and sisters' daughters;[1] and marriage or sexual intercourse with them, or even soliciting them to such intercourse, is prohibited for ever,[2] that is, at all times and under any circumstances.

Mothers are a man's own mother, and his grandmothers by the father's or mother's side, and how high soever. Daughters are the daughters of his loins, and the daughters of his sons or daughters how low soever. Sisters are the full sisters, and the half-sister by the father or the mother. And so as to the daughters of the brother and sister, and how low soever. Paternal aunts are of three kinds: the full paternal aunt, the half paternal aunt by the father (that is, the father's half-sister by his father), and the half paternal aunt by the mother (or the father's half-sister by his mother). And so also the paternal aunts of his father, the paternal aunts of his grandfather, and the

[1] The prohibition is contained in the following passage from the Korán:—'Ye are forbidden to marry your mothers, and your daughters, and your sisters, and your aunts—both on the father's and the mother's side; and your brothers' daughters and your sisters' daughters.'—*Sale's Translation*, vol. i., p. 92.

[2] The distinction between a perpetual and a temporary prohibition is of importance. See *post*, Chapter of Invalid Marriages.

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paternal aunts of his mother and grandmothers. Maternal aunts are the full maternal aunt, the half maternal aunt by the father (that is, the mother's half-sister by her father), and the half maternal aunt by the mother (or the mother's half-sister by her mother), and the maternal aunts of fathers or mothers.

Class Second,

Or such as are Prohibited by reason of Affinity; and of these there are Four Degrees.

Prohibition for affinity.

The first are the mothers of wives, and their grandmothers by the father's or mother's side. The second are the daughters of a wife or of her children how low soever; subject to this condition, that consummation has taken place with their mother, that is, the wife, and whether the daughter be under the husband's protection or not. 'Our' masters do not account retirement with a wife equivalent to actual consummation in rendering her daughters prohibited. The third degree of affinity comprises the wife of a son, or of a son's son, or of a daughter's son, how low soever, whether the son have consummated with her or not; but the wife of an adopted son is not prohibited to the adopted father.[1] The fourth degree are the wives of fathers and of grandfathers, whether on the father's or mother's side, and how high soever. And with all these marriage or sexual intercourse is prohibited for ever.[2]

It is incurred by

The prohibition of affinity is established by a valid marriage, but not by one that is invalid. So that if a man

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[1] Adoption is said (*Inayah*, vol. ii., p. 9) to be abolished by the Korán in a passage which I give at greater length from Sale: 'Call such as are adopted the sons of their natural fathers: this will be more just in the sight of God.' Chap. xxxiii.

[2] These are all included in the prohibition of the Koran, viz.:—'And your wives' mothers, and your daughters-in-law, which are under your tuition, born of your wives, unto whom you have gone in, but if you have not gone unto them it shall be no sin to you to marry them, and the wives of your sons, who proceeded out of your loins.'—*Sale*, as above.

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should marry a woman by an invalid contract, her mother does not become prohibited to him by the mere contract, but by sexual intercourse. And the prohibition of affinity is established by sexual intercourse, whether it be lawful or apparently so, or actually illicit.[1] When a man has committed fornication with a woman, her mother, how high soever, and her daughters, how low soever, are prohibited to him, and the woman herself is prohibited to his father and grandfathers, how high soever, and to his sons, how low soever.

marriage; or illicit intercourse;

As this kind of prohibition is induced by sexual intercourse, so it is also occasioned by touching a woman with the hand[2] or kissing her or looking on her nakedness with desire, whether it be done by right of marriage or of property, or unlawfully, and whether she be a step-daughter or not, for there is no difference in this respect.[3] And if a woman should look on the nakedness of a man with desire, or touch or kiss him with desire, prohibition by affinity would in like manner be incurred, and her mother and daughter would be rendered unlawful to him.[4] Lying together with desire is equivalent to kissing, and so also is mutual embracing. Desire is necessary in all cases, and prohibition is not incurred by looking on, or touching all parts of the body, except when done with desire, and on this point there is no difference of opinion.

Or touching or kissing, &c. with desire.

With regard to touching, the prohibition is equally established, whether it be intentional, or inadvertent, or compulsory, or even in sleep, and apparently whatever part of the person be touched. If a man should touch with his hand the hair of a woman's head at its junction with the head, prohibition would be established without doubt, and

Further details as to touch.

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[1] According to Shafei, the prohibition of affinity is not induced by *zina*: (*Hedaya*, vol. i., p. 81.) This, and similar differences of opinion, are of some importance. See *post*, Chapter of Invalid Marriages.

[2] *Lumusu*.—Tetigit manu et palpavit—Freytag.

[3] The text of the Korán on which the prohibitions of affinity are founded refers particularly to the 'daughters of your wives.' —*Hedaya*, vol. i., p. 78.

[4] *Ibid.*, p. 82.

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according to Natikee, without this distinction, and absolutely. If he should touch her nail with desire, prohibition is established. It is assumed that there are no clothes between the parties, and if there be a cloth between them, so thick that the person touching cannot feel the warmth of the other's body, prohibition by affinity is not established, however much desire may be excited, but if the cloth be so fine that the warmth of her body can be felt by his hand it is established. So also if his hand were applied to the sole of her boot, unless it be so hard as to prevent his feeling the softness of her foot. And when a man kisses a woman with a cloth between them, but is sensible of the cold of her front teeth or of her lip, that is a kiss; and the case is the same with regard to touch. A prolongation of the touch is not necessary; hence it has been said that if a man should reach his hand to a woman, with desire, and it should happen to touch the nose of her daughter, and his desire were increased, the mother would become unlawful to him, though he had withdrawn his hand on the instant. But it is a condition that the female touched be old enough to have desire. And the *futwa* is in favour of nine years as the age of desire, and nothing under it. Even actual connection with a female child so young as to have no desire does not occasion the prohibition of affinity. But though a woman have passed the age of desire, she may still give occasion for this prohibition; for, having once come within the line, she does not get beyond it by becoming old. Desire in the male is also a necessary condition, so that actual connection by a boy of four years old would not induce the prohibition of affinity, while if a boy be of an age that usually admits of sexual intercourse, such intercourse by him is the same as by an adult person, and such a boy is described as one who desires and is desired of women. Desire must in all cases be simultaneous with the touch or sight, for if these occur first without desire, and desire is afterwards excited, prohibition is not incurred. The definition of desire in a man is turgidity of the virile member, or the increase of such turgidity if it have previously existed. And this definition is correct, and decisions are

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given in accordance with it. But it supposes the person to be a young man, capable of coition, for if he be old or impotent the definition of desire in such an one is a motion or beating of the heart, accompanied by desire, if it were not previously beating, and an increase of desire where the movement already exists. The definition of desire in a woman and a *mujboob*,[1] is desire in the heart, or taking delight in it when there is none, and an increase of it when it already exists. The existence of desire in one of the parties is sufficient, but it is a condition that it shall not diminish at the time of touching or seeing, for if it do so the prohibition by affinity is not incurred. And according to Sudur-oos-Shuheed, the *futwa* is in accordance with this distinction.

Cases of acknowledgment connected with the preceding.

If a man should acknowledge that he has incurred the prohibition by affinity he is to be taken at his word, and the parties are to be separated. And the rule is the same though he should ascribe its occurrence to a time previous to his marriage, as, for instance, if he should say to his wife, 'I had connection with your mother before your marriage,' he is to be taken at his word, and they are to be separated; but he is not to be credited so far as regards the dower, and is accordingly liable for the whole amount specified or agreed upon, but without the *ookr*, (or prescribed ransom for vitiated virginity.) It is not necessary that he should persist in the declaration, for though he retract, and say 'I lied,' the judge is not to believe him; but, as between himself and his God, if the declaration were really false, his wife would not be prohibited to him. And Moohummud has related in his book of marriage, that if a man should say to a woman, 'This is my mother by fosterage,' and afterwards wishing to marry her should say, 'I made a mistake in this matter,' he is allowed to marry her on a liberal construction of the law. The reason of the difference between the two cases is, that in the former the declaration which he makes has

[1] From *jubb*, which means the removal of the penis only. *Doorr-ool-Mookhtar*, p. 267.

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reference to his own act, and as a mistake with regard to one's own act is rare, he is not to be believed; but in the case of fosterage what he declares to be his own act has reference to another fact, of which his knowledge must have been derived by hearing from other persons, and in such matters it is by no means uncommon to make a mistake. When a man kisses or touches a woman, or sees her nakedness, and then says it was not with desire, Sudur-oos-Shuheed has said that in the case of the kiss a decree should be given for establishing the prohibition unless it be proved that the kiss was without desire; but that in the case of the touch, or sight of the nakedness, a decree is not to be given for the prohibition, until it be proved that the act was done with desire; for desire is implied in kissing, but not in touching nor in seeing the nakedness. This, however, is only when the touch is on some other part of the person than the actual nakedness, for otherwise the assertion is not to be credited. The Sheikh Zuheer-ood-deen Al Moorghenanee used to decree for the prohibition in the case of a kiss on the mouth, the cheek, or the head, though it were on the *mikna* or coif, and to say that the man is not to be believed in saying that the kiss was without desire, but is entitled to credit if he deny desire in the case of a touch, in the absence of some unequivocal sign, as embracing her round the neck. And if he put his hand upon her bosom and say it was not with desire, he is not to be believed, because the presumption is against him; so also if he should ride together with her on a beast; but the contrary, if he ride on her own back to cross a water.

Testimony, how far receivable.

Testimony is to be received to a person's acknowledgment of having touched or kissed with desire. But is it to be received to be the mere fact of touching or kissing with desire? The approved doctrine is that it should be received; and Aly-al-Buzduvee was of that opinion. Moohummud has reported to the same effect in the Jamâ on the subject of marriage; for desire is an emotion that continues for some time, and is indicated by a quivering

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of the members and other signs. And it is customary to receive the evidence.

Miscellaneous cases.

A man is asked, 'What did you do with the mother of your wife?' and he answers, 'I had connection with her,'—prohibition by affinity is established; and it is said that even though the questioner and the answerer were both in jest, there would be no difference, and that the man is not to be believed if he allege that he lied. A man having a female slave says, 'I had connection with her,'—she is no longer lawful to his son. But if the slave were not his property, and he should say, 'I had connection with her,' the son might disbelieve the assertion, and have connection with her, for the presumption is in his favour. And if the slave come to him by inheritance from his father, he may have connection with her, unless he know that his father had such connection.

If a woman complain that a touch of her by her husband's son was with desire she is not to be believed, and the word of the son is to be preferred. A man kisses his father's wife with desire, or a father kisses his son's wife with desire, against her will in either case, and the husband denies that the kiss was with desire, the word of the husband is to be preferred; but if he admit that it was with desire, a separation must be made between the married parties, and the husband is liable for the dower. He is, however, entitled to have recourse against the aggressor if the mischief was intended, but if it was done unintentionally he has no redress. In a case of actual connection he would have no right of redress against the party who did the mischief, though he actually intended by the act to do the injury, because in that case liability to the *hudd*, or specific punishment for the particular offence, would be incurred, and a pecuniary mulct cannot be joined with the *hudd*. A man marries the slave of another, and she kisses the son of her husband before he has consummated with her, and the husband complains that the kiss was with desire, but the master denies that it was so; in these circumstances the slave becomes absolutely separated or divorced from her husband by

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reason of his declaration that she kissed with desire, and he is liable for half the dower by reason of the master's denial that the kiss was with desire. But the word of the slave herself would not be entitled to credit if she should say, 'I kissed him with desire.'

Marriage is not dissolved, but only vitiated by incurring the prohibition of affinity.

Moohummud has stated in his book of Marriage, that the general principle is that marriage is not taken away or dissolved by the prohibition of affinity, or fosterage, but that it is rendered invalid or vitiated, so that if the husband should have connection with his wife before actual separation, he is not liable to the *hudd*, whether he had any doubt on the subject or not. When a man has done wickedly with a woman, and repented of his misconduct, he is still prohibited to her daughter, for the prohibition of marriage with her daughter which he has incurred is perpetual; and this is evidence that prohibition is established by illicit intercourse, and by whatever induces prohibition by affinity.

There is no objection to a man marrying a woman, and his son marrying her daughter or mother.

Class Third,

Or Women who are Prohibited by reason of Fosterage.

Prohibition for fosterage.

Every woman prohibited by reason of consanguinity and affinity is prohibited also by fosterage, as will be explained in the Book of Fosterage.

Class Fourth,

Or Women who cannot be Lawfully Joined Together.

Women who cannot be lawfully joined together.

This prohibition is of two kinds: one applicable to women who are strangers to each other, and the other applicable to women who are related to each other.

Number of wives.

First, with regard to strangers. It is not lawful for any man to have more than four wives at the same time. And it is not lawful for a slave to marry more than two. A *Mookatub*, *Moodubbur*, and the son of an *Oom-i-*

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wulud,[1] are like absolute slaves in this respect. It is lawful for a free man to keep and cohabit with as many female slaves as he pleases, but it is not permitted to a slave to keep and cohabit with any, even with the permission of his master. A free man may marry four women whether they be slave or free. And a slave may marry two women whether they be slave or free. When a free man has married five wives in succession the marriage of the four first is lawful, but the marriage of the fifth is unlawful, and if he marry five in one contract, the marriage of the whole is vitiated.[2] The case is the same with regard to a slave who marries three. If an alien marry five wives, and they all embrace the faith, and if he had married them in succession, the marriage of the four first is lawful, and a separation should be made between him and the fifth, according to all opinions, while, if he had married the whole together, he must be separated from the whole, according to Aboo Huneefa and Aboo Yoosuf, and if he had married first one and then four, the first marriage would be lawful and none of the others.

Women within the prohibited degrees cannot be joined together.

Second, with regard to the joining together of women who are relatives. It is not lawful to cohabit with two sisters, either in marriage or by right of property, whether they be sisters by consanguinity or fosterage. The general principle with regard to the joining together of women, is, that it is not lawful to join together any two women, who, if we suppose one of them on whichever side to be a male, could not lawfully intermarry, by reason of consanguinity or fosterage. Hence it is not lawful to join a woman with her paternal or maternal aunt, by consanguinity or fosterage, but it is lawful to join a woman with her husband's daughter.[3] And in like manner a woman and her female

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[1] Literally, mother of a child. A slave who has borne her master a child, acknowledged by him, and who is entitled to her freedom at his death. The son referred to in the text is by another man.

[2] It may be of importance to observe, that in neither case is the marriage said to be *batil*, or void. See *post*, Chapter of Invalid Marriages.

[3] Because, though if we suppose the daughter to be a male, marriage

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slave may be joined together, for the unlawfulness of marriage in such a case is neither by reason of consanguinity nor fosterage. If a man marry two sisters by one contract he must be separated from them both, and if the separation take place before consummation, they are not entitled to anything, but if it take place after consummation, each of them is entitled to whichever is the less of her *muhr-misul*, or proper dower, and the dower mentioned in the contract. Should the sisters be married by separate contracts, the marriage of the last married is invalid, and it is incumbent on the husband to separate from her. If the judge be aware of the fact, he is bound to make the separation, and if he do so before consummation none of the legal effects of marriage are inferred, but if not till after consummation the woman is entitled to dower, and the husband liable for whichever may be the less of her proper dower and the dower specified. She must also observe her *iddut* (or term of probation), and the paternity of her offspring is established, the husband being bound to refrain from matrimonial intercourse with his wife, until the expiration of the sister's *iddut*. If he had married the two sisters by separate contracts, and it is not known which of the contracts was first, the husband is to be required to explain, and if he do so the priority is determined according to his explanation; but if he fail to explain, he has no choice, and must separate from both. And if the separation take place before consummation, they are entitled to half the dower between them, supposing the dowers to have been equal, and specified in the contracts, but if the dowers were of different amounts, then each woman is entitled to a fourth part of her own dower. If no dower be specified in the contract, a single *mootaut* (or present) is due between them, in exchange for the half dower. Should the separation take place after consummation, each woman would be entitled to her full dower.

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between the parties would be unlawful, yet if we suppose the woman to be a male there could be no *husband's* daughter, and the condition requires illegality on both sides.—*Kifayah*, vol. ii., p. 15.

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A woman who cannot be lawfully joined with another is not prohibited after separation from the other.

The rules above mentioned with regard to two sisters apply equally to all other near relatives, who cannot be lawfully joined together in connection with a man. And if a man desire to marry one of the two after separating from the other, he is at liberty to do so, provided that the separation take place before consummation; but if it do not take place till after the consummation, he must wait till the expiration of both their *idduts*. When the *iddut* of one has expired, but not that of the other, he may marry the woman who is still in her *iddut*, but not the other, until the unexpired *iddut* be also completed. If consummation with one only has taken place, he may marry that one, but not the other, until the expiration of her sister's *iddut*, and when that has expired he may marry whichever of them he pleases.

The prohibition extends to concubines as well as wives.

As it is not lawful for a man to be married to two sisters at the same time, so also it is unlawful for him to keep them both for pleasure; and when a man is the owner of two sisters, he may enjoy whichever of them he pleases, but when he has enjoyed one of them he is not at liberty to enjoy the other; and in like manner, if he should buy a female slave and have connection with her, and then purchase her sister, he may repeat his intercourse with the first, but cannot have connection with the other, until he has made the first unlawful to him, which is done either by marrying her to another man, or parting with his right of property in her, by manumission, gift, sale, bestowing her in charity, or *kitabut*.[1] Manumission of part is equivalent to manumission of the whole, and transferring his right of property in part is equivalent to a transfer of the whole. But if he merely say, 'she is prohibited to me,' the other does not become lawful; as the occurrence of the courses, *nifas* (or the time of purification after childbirth), putting on the *ihram*, or pilgrim's garment, on coming within the territory of Mecca, and fasting, are all causes of

[1] A contract of emancipation for a ransom entered into between a master and his slave, who becomes, in consequence, a *Mookatub*, and cannot be sold unless he fail to pay the ransom.

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prohibition. When he has had connection with both, he is not at liberty to repeat it with either till the other is rendered unlawful to him, as already explained. And if he sell one of the two, or give her in marriage, or as a gift, and the sold one is returned to him on account of a defect, or he revokes the gift, or the husband of the married one divorces her, and her *iddut* has expired, he cannot have connection with either till he has rendered the other unlawful to him. Suppose a man to marry a female slave and to refrain from intercourse with her till he has purchased her sister, he would not be at liberty to enjoy the purchased slave, because the bed is established by mere marriage, and if he were to have connection with her, it would be a joining of both in one bed. And if he should marry the sister of a slave whom he has already enjoyed, the marriage would be valid; and being so, he is not to have connection with the slave, even though he should refrain from matrimonial intercourse with his wife: nor can he have connection with his wife until he has rendered her enjoyed sister unlawful to him in some of the ways already specified; after which he may have connection with his wife, and he may immediately have such connection if he had never enjoyed the slave. Should the marriage with the slave's sister be invalid, the slave is not prohibited to him until he consummate with his wife; whereupon any further intercourse with the slave would also become unlawful. A man marries two sisters, one of whom is in her *iddut* for another man, or is actually married to another, the marriage with the woman who is free from any tie is lawful.

And continues during *iddut*.

It is not lawful for a man to marry the sister of his *mooâtuddah* (or repudiated wife who is still in her *iddut*), whether the *iddut* be for a revokable, or absolute, or triple repudiation,[1] or for an invalid or a dubious marriage. And as it is unlawful to marry the sister of a woman who is in her *iddut*, so it is unlawful to marry any other of her near relatives who could not be lawfully joined

[1] Shafei held it to be lawful.—*Hedaya*, vol. i., p. 83.

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with her; or to marry four others besides her. And if a man emancipate his *oom-i-wulud*, it is not lawful for him to marry her sister until the expiration of her *iddut*: but he may lawfully have four wives besides her, according to Aboo Huneefa; while according to the two disciples, the sister is lawful to him also. If the husband say, 'she informed me that her *iddut* was past,' and this be within a time not ordinarily sufficient for that purpose, his word is not to be received; nor is hers when giving such information, unless she accompanies it by some probable explanation, as the miscarriage of a formed child,[1] or the like; but if the assertion of the husband be made at a time within which it may be reasonably supposed that the *iddut* has expired, and she assent to his statement or remains silent, or is absent, he may marry another or her sister if he please; and so also though she should negative his statement, according to our sages. It is lawful for the husband of an apostate who has fled to a foreign country to marry her sister before the expiration of her *iddut*, in the same way as if she had died. And if she should return as a *mooslimah*[2] after the marriage with her sister, the marriage would not be vitiated, since the *iddut* does not revive; but if she should return before the marriage, though the result would still be the same, according to Aboo Huneefa—for, in his opinion, the *iddut* having once ceased does not revive without a new cause—yet, according to the disciples, it would not be lawful to marry the sister, because by the return of the woman in the faith, her flight becomes in law an ordinary absence, and as her property reverts to her in such circumstances, so also does she return to the state of a *mooâtuddah*.

It is not lawful to conjoin two women each of whom is the aunt of the other: a relationship which might arise by each of two men marrying the mother or the daughter of the other, and begetting a daughter; for in the former

[1] Literally, a child whose creation is manifest. The *iddut* of a pregnant woman is completed by her delivery.

[2] Feminine of *Mooslim*.

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case the daughters would be paternal, and in the latter maternal, aunts to each other.

Marriage of a man to two women, one of whom is lawful, and the other prohibited.

A man marries two women, one of whom he cannot lawfully marry by reason of her being within the prohibited degrees, or the wife of another husband, or an idolatress, but the other of whom it is lawful for him to marry, the marriage with her who is lawful to him is valid, but the marriage with the other is void;[1] and the whole of the specified dower belongs to her whose marriage is lawful, according to Aboo Huneefa.[2] But suppose him to consummate with her who is not lawful to him, then, as reported in the Asul, she would be entitled to a proper dower, whatever it might amount to, and the other woman would be entitled to the whole of the dower specified in the contract. And it is said in the Mubsoot that this is correct according to Aboo Huneefa.

Class Fifth,

Or Female Slaves married upon Free Women (that is while Marriage with a Free Woman is still subsisting) or together with them.

A man already married to a free woman cannot marry a slave.

The marriage of a female slave upon a free woman, or together with her, is not lawful.[3] And in like manner as to a *moodubburuh*[4] and *oom-i-wulud*. If a female slave and a free woman be put together in one contract, the marriage with the free woman is valid, but that with the slave is void, that is, when the marriage with the free woman if it stood alone would be valid; for otherwise the addition of the free woman to the slave would not invalidate the marriage with the slave; and supposing him to

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[1] By one contract is implied.—*Hedaya*, vol. i., p. 92.

[2] According to the disciples, the dower should be divided rateably according to the proper dower of each woman.—*Ibid.*

[3] Shafei held it to be lawful for a slave to make such a marriage, and Malik, for anyone with the free woman's consent.—*Hedaya*, i., p. 87.

[4] Feminine of *Moodubbur*.

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marry the slave first and then the free woman, the marriage of both would be lawful. If a man should marry a female slave upon a free woman who is still in her *iddut* after an absolute or a triple repudiation, it is not lawful according to Aboo Huneefa, though lawful according to his disciples; and if she be in her *iddut* for a revokable repudiation, the marriage is unlawful without any difference of opinion, while if the *iddut* of the free woman be for an invalid marriage or sexual intercourse of doubtful legality—though Husn has related that there was a difference of opinion between the master and his two disciples on such a case—according to another report, they all agreed in thinking that the marriage with the slave would be lawful; and this is more probable and likely. When a man marries a free woman during the *iddut* of a slave for a revokable repudiation, and then recalls the slave, this is lawful.

A slave marries a free woman and consummates with her without the permission of his master; he then marries a slave, but still without his master's permission, and subsequently the master sanctions both marriages; the marriage with the free woman is lawful, but not that with the slave. A man having a grown-up daughter and a grown-up female slave, says, 'I have married them both to you, each for so much,' and the husband accepts the marriage with the slave, it is void nevertheless; and if he should afterwards accept the marriage with the free woman it would be lawful. Cases.

It is lawful for a man to marry a slave who is either a *Mooslim* or *Kitabeeah*, even though he should have the means of marrying a free woman.

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Class Sixth,

Or Women who are prohibited by being involved in the rights of others.

A man may not marry the wife or *mooâtuddah* of another;

It is not lawful for a man to marry the wife, or the *mooâtuddah* of another, whether the *iddut* be on account of repudiation, death, or the consummation of an invalid or a semblable marriage. And if a man should marry the wife of another, not knowing her to be the wife of another, and should have connection with her, an *iddut* would be necessary; but if he knew her to be the wife of another, it would not be required, so that her husband would be under no prohibition from having matrimonial intercourse with her.[1] It is lawful for the master of the *iddut*, that is, the person by connection with whom it is induced, to marry the *mooâtuddah* when there is no other impediment besides the *iddut*.

nor a pregnant woman, unless the pregnancy is unlawful;

Aboo Huneefa and Moohummud have said that it is lawful for a man to marry a woman pregnant by whoredom, though he must refrain from matrimonial intercourse with her till her delivery. Aboo Yoosuf, however, was of opinion that the marriage is not valid, but the *futwa* is in accordance with the opinion of the two others. As it is not permitted to have connection with her, so also it is not permitted to solicit her. In the Mujmooa Nuwazil it is

or was induced by himself;

stated that when a man marries a woman with whom he has already had illicit intercourse, and it appears that she is pregnant, the marriage is lawful, and he may have connection with her, and she is entitled to maintenance according to all their opinions. A man marries a woman and she miscarries of a child which appears to be created or fully formed; if the miscarriage take place at four months, the marriage is lawful, but if it take place within this period it is not lawful, for creation is not established in

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[1] In the first case there would be a semblable marriage, which requires *iddut*, while in the second there would be mere adultery, which does not require it.

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less than 120 days.[1] The marriage of a woman pregnant of a child whose descent or paternity is established,[2] is not lawful according to all opinions; but according to Aboo Huneefa, if the descent be established from an enemy, as for instance, if the woman be a fugitive or a captive, the marriage would be lawful, but the husband should not have connection with her till after her delivery. Aboo Yoosuf has reported to this effect as from Aboo Huneefa, and Tahavee has confidence in the report, but it was contradicted by one by Moohummud on which Kurkhee relies, and the report relied on by him is most correct.[3] A man gives his *oom-i-wulud* in marriage when she is pregnant by himself, the marriage is void;[4] but if she were not pregnant the marriage would be valid. When a man has had connection with his bondmaid, and then gives her in marriage, the contract is lawful,[5] but he ought first to purify her (by suffering a term of her courses to elapse) as a measure of precaution, on account of his seed. This purification is required of the master rather as a matter of propriety than as being absolutely necessary. And since the marriage is lawful, the husband may have connection with his wife before the purification, according to Aboo Huneefa and Aboo Yoosuf; but Moohummud was of opinion that such connection was improper until the purification, and the lawyer Aboo Leeth has said that 'the opinion of Moohummud is recommended for its caution, and we adopt it.' This difference of opinion relates to a case where the master has given the woman in marriage before making her undergo a purification, but if that precede the marriage, the

nor can he give his *oom-i-wulud* in marriage if she is pregnant.

[1] And she must, therefore, have been pregnant at the time of the marriage, and, in consequence, in her *iddut*. It is implied, that the pregnancy was not the fruit of unlawful intercourse.

[2] This condition excludes a pregnancy, the fruit of illicit intercourse.

[3] This report is adopted by the author of the *Hidayah*.—Vol. ii., p. 37.

[4] The descent of the child being in this case established without positive claim.

[5] Here the descent of the child is not established without being claimed.

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husband may lawfully have connection without any further purification, according to all their opinions. When a man has seen a woman commit fornication, and then marries her, he may lawfully have connection with her without waiting for her purification, according to the opinion of the two, but Moohummud has said that such connection is improper until her purification.

A father may marry the slave of his son; and a female captive any one but her captor.

A father may lawfully marry the bondmaid of his son according to us.[1] A female captive may lawfully marry anyone but her captor,[2] when she has been captured alone, without her husband, and brought within the Mooslim territory, according to all opinions, and she is not bound to observe an *iddut*; and in like manner a *Moohajirah*, or fugitive from her own country to ours, may lawfully marry, and is not bound to observe an *iddut*, according to Aboo Huneefa. But Aboo Yoosuf and Moohummud have said that an *iddut* is incumbent upon her, and that her marriage is not lawful. There is no difference of opinion among them as to the unlawfulness of connection with her before purification by the occurrence of her courses.

Class Seventh,

Or Women prohibited by reason of Polytheism.[3]

A *Mooslim* cannot marry a polytheist.

It is not lawful to marry *Mujooseeahs* (or fire worshippers) nor idolatresses; and in this respect there is no difference between free women and slaves. Among the worshippers of idols are included the worshippers of the sun

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[1] Though he has such a right in the slave of his son, as to justify his having intercourse with her.

[2] The reason of the exception seems to be, that, by being made a prisoner, she becomes the slave of her captor.

[3] Literally 'associating,' that is, with God. The term *mooshrik*, or associator, is sometimes applied to Christians on account of their belief in the Divinity of Christ, and to Jews who are supposed to believe Azeer or Esdras to be the Son of God; but it does not include them in this place, for the marriage of *Mooslims* with either is expressly permitted in the Kooran.—*Hidayah* and *Kifayah*, vol. ii., p. 21.

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and stars, and images which they hold in reverence, and the *Mooûtillah*,[1] *Zunadook*,[2] *Bataniah*,[3] *Abahiah*,[4] *Moobuyizzoh*,[5] and persons of every creed by belief in which one is deemed a *Kafir*, or infidel. A *Mooslim* is not to have carnal intercourse with an idolatress or a *Mujooseeah* by right of property, but he may lawfully marry a *Kitabeeah*,[6] whether she be an enemy or a subject, free or a slave, though it is better to refrain. When a *Mooslim* has married a *Kitabeeah* he may restrain her from going to church or synagogue, and from taking wine into his house. But he cannot compel her to wash after her courses, childbirth, or other ceremonial pollution. When a *Mooslim* marries a foreign *Kitabeeah* in the *Dar ool Hurb*, or a foreign country, the act is lawful but abominable; and if he should bring her out into the *Dar ool Islam*, or *Mooslim* territory, they remain in the state of marriage. But if he should come out, leaving her in a foreign country, a separation takes place by reason of the difference of countries.

But he may marry a Kitabeeah.

All who believe in a heavenly or revealed religion, and have a *kitab*, or book that has come down to them, such as the book of Abraham and Seth, and the psalms of David, are *Kitabees*, and intermarriage with them, or eating of meat slaughtered by them, is lawful. With regard to Sabean women, they are lawful to *Mooslims*, though according to Aboo Huneefa, the connection is abominable; but according to the other two, it is not lawful. The reason of this difference of opinion is, that Aboo Huneefa looked upon them as a kind of Nazarenes who read the psalms of David, and venerate certain stars only as

Kitabees, who?

[1] One who adopts the dogma called *Tateel*, which consists in divesting the essence of the Deity of every attribute, and reducing it, in some sense, to nothing.—De Sacy, *Chrestomathie Arab.*, tom. i., p. 325.

[2] Sadducee, considered an atheist.

[3] The same as the Assassins of whom mention is made in the Crusades.

[4] Name of an Antinomian sect.

[5] A Mussulman sect, so called because they wear white garments.

[6] Feminine of *Kitabee*.

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Mooslims do the *Kiblah* of Mecca; while the other two consider their veneration of these stars tantamount to worship, and class them with idolaters.

Case of a *Kitabeeah* changing her religion.

A person one of whose parents is a *Kitabee* and the other a *Mujoosee* is subject to the same rules as *Kitabees*.[1] And if a *Mooslim* marry a *Kitabeeah* and she become a *Mujooseah*, she is unlawful to him, and the marriage with her is dissolved; but if he marry a Jewess and she becomes a Christian, or a Christian and she becomes a Jewess, the marriage is not vitiated; nor would it be vitiated, according to Aboo Huneefa, though she became a Sabean, but in that case it would be vitiated in the opinion of the other two. Khajindee says that the principle in those cases is, that when one of the parties turns to a state that would render the contract illegal if it were still to be entered into, what was legal before is made void. When, then, a marriage is vitiated by perversion to *Majooseeism*, and the perversion is on the part of the woman, a separation takes place, and she is not entitled to any part of the dower, nor to a *mootaut* or present, when the occurrence takes place before consummation; but if the perversion be on the part of the man, and it occurs before consummation, the woman is entitled to half the dower if a dower were specified, or to a *mootaut* if none were mentioned; while if the occurrence take place after consummation, she is entitled to the full dower.

An apostate cannot marry.

It is not lawful for an apostate to marry a woman who has apostatized, nor a *Mooslimah* (or female *Mooslim*), nor an infidel by origin; and in like manner it is not lawful for a female apostate to marry with anyone.

A *Mooslimah* cannot marry a *Kitabee*.

The marriage of a *Mooslimah* with an apostate or with a *Kitabee* is unlawful. Idolatresses and *Mujooseeahs* are lawful to all infidels except apostates. And *Zimmees*, or infidel subjects, may lawfully marry with *Zimmeeahs*, though of a different persuasion. It is lawful to marry a *Kitabeeah* upon a *Mooslimah* and a *Mooslimah* upon a

[1] This is a result of the general rule, that the child follows the better religion when the parents differ.

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Kitabeeah, both being in this respect equal in class from their equality in regard to the lawfulness of marriage.

Class Eighth,

Or Women prohibited by reason of Property.

A woman cannot marry her slave;

It is not lawful for a woman to marry her slave, nor a slave of whom she is part owner; and since bondage is an objection to marriage, so a marriage is rendered void by one of the married parties becoming the owner or part owner of the other.

nor a man his bondwoman;

When a man marries his bondwoman or *Mookatubah*, or *Moodubburah*, *or oom-i-wulud* or a slave of whom he is part owner, it is not a marriage. In like manner it is not lawful for a man to marry a bondmaid in whom he has any right of property, as for instance, one acquired by his *Mookatub*, or by a slave licensed by him, and who is in debt. They say that in these times it is better that a man should marry his own slave, so that if she should happen to be free, his connection with her may be lawful by virtue of the marriage.

but a licensed slave, or a *Moodubbur* may marry his own slave.

When a licensed slave, or a *Moodubbur*, purchases his own wife, marriage is not annulled, and, in like manner, when a *Mookatub* purchases his own wife, he does not vitiate the marriage; but if a *Mookatub* purchase a slave and marry her, the marriage is not valid. One who is partially emancipated is, according to Aboo Huneefa, subject to the same rule as a *Mookatub*, and when he purchases his own wife his marriage with her is not vitiated; but, according to the other two, he is free, though in debt, and the marriage is vitiated. When a freeman purchases his wife with a stipulation for an option, the marriage is not annulled, according to Aboo Huneefa;[1] but when a *Mookatub* marries his mistress, the contract is not valid, and if he have connection with her he is liable for the *ookr;* and in like manner, when a man marries his *Mookatubah* the marriage is not valid, and he is also

[1] For the reason of this see *M. L. S.*, p. 68.

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liable to the *ookr* if he have connection with her. And though the *Mookatub* be emancipated after he has married his mistress, the marriage does not become lawful. If a *Mookatub*, or an absolute slave, marry his master's daughter with his permission, the marriage is lawful; but if the master die the marriage of the slave is vitiated, but not that of the *Mookatub*, according to us.[1] If the *Mookatub* should afterwards become emancipated the marriage would be confirmed, but if he should be unable to fulfil the terms of his ransom and be obliged to return to slavery, the marriage of the daughter would be annulled, and if this should happen before consummation, the whole dower would fall to the ground, but if not till after the consummation, then only so much of the dower as corresponds to the daughter's share in the person or value of her husband would abate, and what corresponds to the shares of the other heirs would remain. If a *Mookatub* should marry the daughter of his master, after his master's death there would be no contract.

Class Ninth,

Or Women prohibited by reason of Divorce.

A wife repudiated three times if free, or twice if a slave, cannot be remarried by her husband.

It is not lawful for a man to marry a free woman whom he has repudiated three times, nor a slave whom he has repudiated twice, till another husband has consummated with her. And as it is not lawful to marry her, so neither is it lawful for him to have connection with her by virtue of a right of property. And if a man should marry a slave, repudiate her twice, and then purchase and emancipate her, still it would not be lawful for him to marry her again till another had married and consummated with her, and then repudiated her, and her *iddut* had expired.

[1] On the master's death the daughter would become part owner of her husband, to the extent of her share in the inheritance.

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CHAPTER IV.

OF GUARDIANS.

GUARDIANSHIP is established by four different causes--Propinquity, *Wula*,[1] *Imamut*,[2] and Property. Guardianship: how established.

Guardianship in marriage, according to a saying of the Prophet, belongs, in the first place, to the *Âsubât*,[3] (or agnates), in the order of inheritance, the more remote being excluded by the nearer.[4] The nearest guardian to a woman is her son; then her son's son, how low soever; next her father; then her grandfather, that is, her father's father, how high soever.[5] When an insane woman has a father and a son, or a grandfather and a son, the guardianship belongs to the son, according to Aboo Huneefa and Aboo Yoosuf, but to the father, according to Moohummud. It is better, however, that the father should direct the son to give her in marriage, so that it may be lawful without any difference of opinion. After the above persons comes the full brother; then the half-brother by the father's side; then the son of the full brother: then the son of the half-brother by the father's side, how low soever; then the full uncle; then the half-uncle by the father's side; then Guardians by propinquity.

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[1] The relation between a freed man and his emancipator, or a proselyte and the person by whose influence he has been converted.

[2] Leadership of the Moohummudans.

[3] The term includes all males connected with a party through males; and those that follow are all *âsubat*, in the order of inheritance.

[4] *Hidayah*, vol. i., p. 42.

[5] Malik restricts it to the father; Shafei to the father and grandfather.

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the son of the full uncle; then the son of the half-uncle by the father, and their descendants; then the father's full paternal uncle; then his paternal half-uncle by the father's side; then the sons of both in the same order; then the grandfather's full paternal uncle; then his paternal half-uncle by the father's side; and then the sons of both, in the same order; then a more remote man of the woman's *âsubát*, and he is the son of a distant paternal uncle.

Have the power of compelling minors.

All these guardians have the power of compulsion over a female or a male during minority, and over insane persons though adult.

The emancipator or emancipatress.

After all the preceding comes the emancipator or emancipatress, for in this case male and female are alike: and then the *âsubut* [1] of the emancipator or emancipatress.

Uterine relatives.

Failing *âsubát*, every near uterine relative [2] who may inherit from a minor, whether a boy or a girl, has the power of giving him or her in marriage, according to the Zahir Rewayut, as from Aboo Huneefa; but, according to Moohummud, guardianship does not belong to uterine relatives, and there is some confusion as to the opinion of Aboo Yoosuf. The nearest, according to Aboo Huneefa, is the mother, then the daughter, then the son's daughter, then the daughter's daughter, then the daughter of the son's son, then the daughter of the daughter's daughter, then the full sister, then the half-sister by the father's side, then the half-brother and sister by the mother, then their children. After the children of sisters come paternal aunts, then maternal uncles, then maternal aunts, then the daughters of maternal uncles, then the daughters of maternal aunts; and the false or maternal grandfather is preferred to the sister, according to Aboo Huneefa.

The *Mowla-ool-Mowalat*.

The *Mowla-ool-Mowalat* [3] is next; then the Sultan or

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[1] Singular of *âsubát*, usually pronounced *asubáh* in India.

[2] Arab. *Zuwee' l'arhám*, termed distant kindred in respect of inheritance. *Arhám*, pl. of *rihm*, the womb.

[3] A person with whom a proselyte enters into a compact in the following terms:—'You are my mowla—you will be my heir when I die, and pay the mulct when I commit an offence;' and who accepts the terms.

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ruler,[1] and then the judge, and a person appointed by him.

The judge has the power of contracting a person in marriage who requires a guardian, when it is within his commission and authority; but when it is not within his commission, he is not the guardian. If a judge should contract a woman in marriage when he has no authority from the Sultan for that purpose, and should afterwards, upon receiving such authority, give his sanction to the marriage, it would be lawful, on a liberal construction of the law: and this is correct. The judge.

When the judge marries a young girl to himself, it is a marriage without a guardian; for in his personal concerns he is a mere subject, and the guardianship devolves on the person above him, that is, the *wâlee* or governor, who also is but a subject in his own matters. Nay, the Khuleefah[2] himself is no more than a subject in things that regard himself. The judge cannot contract a female minor to himself.

It is lawful for the son of a paternal uncle to marry his uncle's daughter to himself. When the judge marries a young girl to his own son, the transaction is not lawful, contrary to the case of all other guardians. An uncle's son has that power.

An executor has no authority to contract a boy or a girl in marriage, whether he be appointed by the father or not, except when the executor happens to be the natural guardian, and then he has the power by virtue of his guardianship, not of his executorship. And if a boy and girl be both under the care or custody of a person who has brought them up, as, for instance, one who picks up a foundling or the like, the person has no authority to marry them to each other. An executor has no power to contract a minor in marriage.

A slave cannot be the guardian of anyone; nor can a *mookatub* be guardian to his own child. A minor or an insane person has no power of guardianship; and an infidel Persons who may or may not be guardians.

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[1] As representing the IMAM.

[2] The successor of Moohummud, and so the true Imam. None has been generally acknowledged since the taking of Baghdad by the Tartars, in 1258 A.D.

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cannot be guardian to a *mooslim*, whether male or female; nor a *mooslim* to an infidel, whether male or female. It is said, however, that it ought to have been added, unless the *mooslim* be the master of an infidel bondwoman, or be the Sultan. An infidel may be guardian to one like himself. But an apostate cannot be guardian to anyone, whether a *mooslim* or an infidel; nor even to an apostate like himself. Profligacy is no impediment to guardianship.[1]

Guardianship ceases on the insanity of the guardian.

When a guardian becomes permanently insane, his guardianship ceases; but if he be mad with lucid intervals, his guardianship does not cease, and his acts during a lucid interval have legal operation. According to one report, the *Imam*[2] fixed continuance for a month as the criterion for determining the character of the madness, and decrees are given accordingly.

Guardianship of a father continues when his son attains to majority, insane.

When a son has arrived at puberty, lunatic with lucid intervals, or a confirmed madman, the father's guardianship over his person and property continues. In the *Futawa* of Aboo Leeth, it is stated that when a man contracts his grown-up son in marriage, and the son withholds his consent till he becomes permanently mad, and the father then allows it on the son's behalf, the marriage is lawful; but the lawyer Aboo Bukr has reported to the contrary in another case, and has said, that when a son attains to puberty in a state of sanity, and subsequently becomes a confirmed lunatic, or mad with lucid intervals, then, according to Aboo Yoosuf (reasoning from analogy), the guardianship would not revert to the father, but pass on to the judge; so that if the father should intermeddle with his son's property, or contract him in marriage, the act would not be legal; while according to Moohummud, the guardianship would revert to the father, on a liberal construction of the law. The lawyer Aboo Bukr-al-Meedanee insists, however, that the guardianship would revert to the father, according to our three masters.

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[1] That is like appointment to the office, into its exercise; but see farther on, p. 50.

[2] Aboo Huneefa seems intended.

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When a father becomes a confirmed lunatic, or mad with lucid intervals, the guardianship is not established in his son, so far as relates to his property; but it is established in him for the purpose of contracting the father in marriage, according to Aboo Huneefa and Aboo Yoosuf. And this is correct.

A son is the guardian in marriage to his insane father.

When a minor, whether male or female, has two guardians equal in degree, as two brothers or two paternal uncles, for instance, and either of them contracts the minor in marriage, the transaction is lawful, according to 'us.' And it makes no difference whether the other of them allows or cancels the marriage. If they both contract her in marriage, one in succession to the other, the first contract is lawful, and not the other; while if they contract her to different persons at the same time, or it is not known which contract was first, both contracts are void.

Case of two guardians equal in degree.

If a minor, whether male or female, be contracted in marriage by a more distant guardian, while a nearer is present and competent to the guardianship, the contract is dependent on the sanction of the nearer; but if the nearer be incompetent, by reason of minority, or insanity though of full age, the contract is lawful; and, in like manner, if the nearer guardian be absent at such a distance as precludes him from acting, the marriage contracted by the more remote is also lawful. The distance is a short interval, as approved by many of the moderns, and the *futwa* agrees with this. Surukhsee and Moohummud Ben al Fuzl say that it is to be estimated by the chance of losing a present suitable match while inquiry is made for the opinion of the absent guardian. And this is best. And the *futwa* is to that effect. So that if the nearer be concealed in the city, he is not to be waited for, and the absence is to be accounted a precluding one. If a more remote guardian should contract a minor in marriage while a nearer is present, so that the marriage would be suspended on his sanction, and the nearer should then absent himself, by which means the guardianship would devolve upon the more remote, the marriage contracted by the more remote would not there-

Where the guardians are of different degrees.

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upon become legal, nor until sanctioned by him after such devolution of the guardianship.

Difference of opinion as to *status* of nearer during his absence.

There is a difference of opinion among the learned with regard to the guardianship of the nearer, whether it actually ceases during his absence or still subsists. Some say that it still subsists, except that in the absence of the nearer the more remote may exercise the power, and that the case is the same as if the woman had two guardians equal in degree, like two brothers or two paternal uncles; but others say that the guardianship of the nearer ceases during his absence and is transferred to the more remote, and this is most correct. So that if the nearer were to contract her where he may happen to be at the time, the contract ought to be unlawful, though there is no report to that effect; while if the more remote were to contract her, the contract would appear to be lawful, though opinions differ on the subject. The authority of the more remote is annulled by the coming or return of the nearer; but not so the contract which he may have actually made, for that was entered into while his authority was complete. All are agreed that when the nearer guardian prevents a woman from marrying, the power devolves on the more remote. When the guardian is absent, or prevents a woman from marrying, or when a father or grandfather is profligate, the judge may contract the woman to an equal.[1]

Minors and lunatics may be contracted in marriage against their will.

The guardian of a boy and girl may marry them to each other against their will, whether the girl be a virgin or *suyyib*, that is, enjoyed. Lunatics, whether male or female, and whether the madness be continued or with lucid intervals, are like the boy and girl, and their guardian may accordingly contract them in marriage when the madness is continued.

Option of puberty.

Where minors are contracted in marriage by a father or grandfather, they have no option on arriving at puberty; but when contracted by any other than a father or grandfather, they have an option on arriving at puberty, and

[1] See *ante*, p. 48.

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may either abide by the marriage or cancel it. This is the doctrine of Aboo Huneefa and Moohummud on the subject; but it is a condition that there shall be the decree of a judge in the matter, contrary to the case of an option after emancipation. And if a boy or girl should choose to be separated, after arriving at puberty, but the judge has not yet made the separation when one of them dies, they have reciprocal rights of inheritance, and up to the actual separation between them by the judge the husband may lawfully have intercourse with his wife. When the judge or the *Imam* contracts one in marriage, the option is established. This is sound, and the *futwa* accords with it. Kazee Budee-ood-deen being asked with regard to a young girl who had married herself to a person who was her equal, she having no guardian, and there being no judge in the village, answered, 'The marriage is contracted, but dependent on her approval after arriving at puberty.' When a young girl contracts herself in marriage, and her brother being her guardian allows the marriage, it is lawful, but she is at liberty to rescind it on arriving at puberty.

How the option of a girl is extinguished.

Mere silence, when the woman is a virgin, is sufficient to extinguish this option upon her part, and it is not extended to the termination of the meeting;[1] so that if a woman, being a virgin, should arrive at puberty, and remain silent, her option would be at an end. But if she were a *suyyib* at the time of marriage, or if then a virgin and her husband had directed her to be conducted to his house, and she had arrived at maturity while living with him, her option would not be cancelled by silence, nor even by her rising from the meeting; but it would be cancelled by her assenting explicitly to the marriage, or doing anything from which her assent might be clearly inferred; as for instance permitting connection with her, or asking maintenance, or the like. She would, however, still retain her option, if she merely continued to eat his

[1] The place or company in which she may happen to be at the time of her attaining maturity. *Hedaya*, i., p. 105, note.

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food or serve him as before. When a woman is aware of the contract at the time of arriving at puberty, but is ignorant that she has an option, and remains silent, her option is annulled; but when she is not aware of the contract at the time of arriving at puberty, she has an option on receiving intelligence of it. When a woman attains to puberty, and inquires the name of her husband, or the amount of the specified dower, or salutes the witnesses, the option of puberty is extinguished.

Occurrence of two rights of option.

When two rights unite in the same woman, such as that of pre-emption and the option of puberty, she should say, 'I claim both the rights,' and then proceed by explaining first the option as to her own person.

Option of a boy, how extinguished.

The option of a boy is not cancelled until he say, 'I have consented,' or something proceeds from him from which his consent may be inferred; and rising from the meeting does not terminate the option of a boy, but it is cancelled by acquiescence.

Course to be followed by a female in exercising her option.

When a woman perceives that her courses have come on, it would be well to exercise her option immediately on seeing the blood; and when she observes it at night, she is to say, 'I have cancelled the marriage,' and take witnesses when she rises in the morning, saying, 'Surely, I saw the blood now,' for she is not to be believed if she say, 'I saw it at night and cancelled.' This is reported in the Mujmooa Nuwazil, the author saying, 'Even though it be a lie,' for a lie is allowable in some cases. Husham has said, 'I inquired of Moohummud regarding a young girl whose paternal uncle had contracted her in marriage, and who, on the appearance of her courses, exclaimed, "Praise be to God, I have made my choice," and (he answered) she has her option. But if she had sent a servant, on the appearance of her courses, to seek for witnesses to attest her declaration, and the servant were unable to procure any, and she had, by reason of her residing in a retired place, delayed for some days, for want of witnesses, he would have made the marriage binding on her, as that would not be a sufficient excuse.' Ibn Sumaut reports, as from Moohummud, that when a

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woman makes her election to be free, and calls on witnesses to attest the fact, but delays for two months to bring the matter before the judge, she may still avail herself of her option, unless she has intermediately surrendered her person.

Dispute between husband and wife as to exercise of wife's option.

When there is a difference between parties with regard to the option of puberty, the woman saying, 'I elected to be free, and rejected the marriage when I arrived at puberty,' while the husband says, 'Nay, but you were silent, and your option has fallen to the ground,' the husband's word is to be preferred.[1]

Option of puberty is merged in the option of emancipation.

A boy and girl are both slaves when married together by their master; he then emancipates them, and subsequently they attain to puberty; they have not the option of puberty, because the option of emancipation is sufficient without it. But if a person should first emancipate his young bondmaid, and then contract her in marriage, after which she should attain to puberty, she would have her option of puberty, as reported by Asbeejanee.

Separation under the option of puberty is not repudiation.

Separation under the option of puberty is not a repudiation, because it is a separation in the cause of which both husband and wife participate. So also separation under the option of emancipation is not a repudiation contrary to the case of a *Mookheyyerah*, or woman who has been allowed the option of repudiating herself. And it is a general rule that every separation that comes from the part of the wife, without any cause for it on the part of the husband, is a cancellation, such as separation under the option of emancipation or at puberty; and every separation originating on the part of the husband is a repudiation, such as *Eela*, *jub*,[2] and impotence.

Effect of such separation.

When a separation takes place under the option of puberty, and the marriage has not been consummated, the woman has no title to dower, whether the separation be under the option of the man or of the woman;[3] but if

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[1] That is, the burden of proof is cast on the wife.

[2] As to *Eela*, see *ante*, p. 18, *note* 2; and *jub*, *ante*, p. 27, *note* 1.

[3] If it were a repudiation, she would be entitled to half the dower.

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the marriage were consummated, she is entitled to a full dower, be the separation under her own option or that of her husband.

Option of a lunatic on restoration to reason.

An insane woman contracted in marriage by any other than a father or grandfather, has an option on recovering her reason; but she has no such option when contracted by either a father or grandfather. And if contracted by her son, he is like her father, or even before him.

When marriage with a girl may be consummated.

There is a difference of opinion as to the time when a marriage with a young girl may be consummated; some saying that it should not be till she has actually arrived at puberty, and others that it may take place when she has attained the age of nine years. Most of the learned are of opinion that no regard should be paid to years in this matter, but that ability is rather to be considered; and that if a girl be stout and plump, able to bear the embraces of a man, and there is no apprehension of danger to her health, the husband may consummate with her, though she should not have attained to nine years; but that if she be weak or slender, and unable, and there is any reason to apprehend injury to her health, the husband is not at liberty to consummate with her, even though she exceed that age: and this is sound. When a husband has paid down the dower, and calls upon a judge to order his wife to be delivered up to him, and her father declares that she is too young and unfit for a man, and unable to bear his embraces, while the husband maintains that she is quite fit and able, then, if she be a person who usually goes abroad, the judge is to compel her appearance before him, and to determine for himself as to her competency; but if not, he should direct women in whom he can confide to inspect her, and should order her to be delivered or not to be delivered to her husband, according as they may report her to be competent or incompetent.

Marriage by an adult and sane woman does not

The marriage entered into by a free woman who is sane and adult, without a guardian, is quite operative, according to Aboo Huneefa and Aboo Yoosuf, as stated in the Zahir Rewayut. The Sheikh Ata-Ben-Humza being asked,

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with regard to a woman of the sect of Shafei,[1] a virgin and adult, who had married herself to a man of the Hanifite sect, without the permission of her father, who was dissatisfied and had repudiated the marriage, whether such a marriage is valid, replied in the affirmative, and that it would have been equally valid if she had married herself to one of her own sect. require the intervention of a guardian.

No one, not even a father or the Sultan, can lawfully contract a woman in marriage who is adult and of sound mind, without her own permission, whether she be a virgin or *suyyib*. And if anyone should take upon himself to do so, the marriage is suspended on her sanction; if assented to by her it is lawful, if rejected it is null. And she cannot be contracted without her own consent.

When a virgin laughs on being consulted, or after receiving information that she has been contracted, that is assent, on the authority of Koodoree and the Sheikh ool Islam, unless the laugh be in jest or sneeringly, when it would not be consent; and the *futwa* accords with this distinction. If she smile, that is consent, according to Hulwaee. There is a difference of opinion with regard to weeping; but the correct distinction is that, if the weeping be with effusion of tears and unaccompanied by any audible sound, it indicates consent, while, if accompanied by cries and sobs, it is not consent. This is most proper, and the *futwa* accords with it. When a guardian asks permission of an adult virgin to contract her in marriage, and she is silent, silence is permission; so also, if after being contracted by her guardian she gives herself up to her husband, or after being informed of her marriage she asks for her dower, in either case this is acquiescence. If, when told by her guardian that he means to marry her to such an one for a thousand, she remains silent, and the guardian then contracts her, whereupon she says, 'I am not content;' or if he should make the Tokens of consent in a virgin. Laughing. Smiling. Weeping. Silence.

[1] Shafei and Malik both insist on the utter incompetency of a woman to enter into the contract either for herself or another. *Hedaya*, vol. i., p. 95. And if the man is not her equal, the guardian may object, even according to Aboo Huneefa. See *post*, p. 67.

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Its effect varies according to circumstances.

contract without consulting her, and then inform her of the fact, whereupon she is silent; in both cases silence is consent, unless there be a nearer guardian than the one who has made the contract, in which case silence would not be assent, and she would still have an option either to sanction or reject it. When the information is brought by one person, but that person a messenger from the guardian, and she remains silent, her silence is assent, whether the messenger be a just person or not.[1] But when the information is conveyed to her through any other channel than the guardian himself, or a messenger from him, it is necessary, according to Aboo Huneefa, that there should be more than one informant, and that the informants should be just persons, in order to establish the marriage by her silence. Still, though there should be but one informant, and he not a just person, some of our learned men are of opinion that the marriage would be established, even according to the views of Aboo Huneefa, if the woman gave credit to the information, but not so if she disbelieved it, however truthful the informant may appear to be. The disciples, on the other hand, would have deemed her silence sufficient to establish the marriage, if the informant be apparently righteous.

To give it effect, the husband's name should be mentioned, when a woman is asked for her consent.

When a woman is consulted as to marriage, the name of the intended husband should be mentioned, so that he may be known. Hence, if the guardian should say, 'I intend to marry you to a man,' and she should remain silent, that would be no assent; but if he should say, 'I will marry you to such an one, or such an one,' mentioning several, and she should remain silent, that would be an assent to the guardian's marrying her to whichever of them he may please. All this is when she has not entrusted the matter entirely to him; but if she should say, 'I am content with whatever you do,' after his mentioning to her that several persons have proposed for her, or if she should say, 'Marry me to whomsoever you please,' or the like, that would be a valid permission. It has been said, however, that men-

[1] That is, one qualified to be a witness.

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tion should also be made of the dower; and this is the opinion of the moderns, and is stated in the Futtih Kudeer to be most proper. So that if a father should consult his daughter before marriage, and say to her, 'I am going to contract you in marriage,' and does not mention the dower or the name of the husband, and she remains silent, silence is not consent in such a case, and she may afterwards repudiate the marriage; but if both husband and dower be mentioned, and she is silent, silence is consent in that case. If the husband alone is named and without any mention of the dower, and she is silent, and her guardian thereupon *gives* her in marriage, here it is said that the marriage is operative, because her silence is consent to a marriage without any specification of dower, which evidently means a marriage at a *muhr-i-misul*, or proper dower, and that is implied whenever the contract is made by words of gift. It would be otherwise were he to contract her at a specified dower, for she gave him no authority to fix the dower, and the contract would not be operative until subsequently approved by her. When the guardian contracts her without previously consulting her, and then informs her of the marriage after it has taken place, but without mention of either the husband's name or the amount of the dower, and she is silent, there is a difference of opinion as to the effect of the silence, but according to that which is most correct, it is not consent in such circumstances; while, if both husband and dower were mentioned it would be consent; and if the husband alone be mentioned without the dower, then the case is to be determined in the same way as has been already explained, in the consultation before marriage.[1] If the dower alone be mentioned without the name of the husband, and she remains silent, silence is not consent; whether she were consulted before the marriage or only informed of the contract after it took place.

If a guardian should contract his ward in her own presence, and she should remain silent, our doctors differ as

So also the amount of the dower.

Effect of silence when only the husband is mentioned.

Effect of silence when dower only is mentioned.

When the woman is

[1] That is, he may contract her at a *muhr-i-misul*, or proper dower, but not otherwise.

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present at the contract.

to effect of silence in such circumstances, but the more correct opinion is that which holds it to be consent.

Effect of certain expressions by a virgin on being consulted as to a marriage or informed of it.

When a guardian has contracted his ward in marriage, and she has said, 'I am not content,' but afterwards assents at the same meeting, the contract is not lawful.[1] And if the guardian had contracted her in marriage, and she had repudiated the contract, but he should afterwards say to her at another meeting, 'Several persons have proposed for you;' and she should answer, 'I am content with whatever you do,' whereupon he then contracts her anew to the same person, and she refuses to sanction the marriage, she is at liberty to do so. When a guardian consults a virgin as to marrying her to a particular person, and she says, 'Another is better,' this is not permission; but if he inform her of a contract after it has been made, and she gives the same answer, it amounts to a sanction. If the guardian should say to her, 'I wish to marry you to such an one,' and she says, 'It is good;' but, when the guardian has gone out, she says, 'I am not content,' and he is not made acquainted with her last words until he has actually contracted her to the person in question, the contract is valid. When a guardian has contracted his ward, and she says, 'What has been done is approved,' or 'Thou hast done well,' or 'God bless you' or 'us;' or if she accepts congratulations; all this is consent. But if she say, 'I have no occasion for marriage,' or 'I have already told you I don't wish it,' or 'I am not content,' or 'I will not bear it,' or 'I abhor it;' all these, according to Aboo Yoosuf, amount to rejection: while if she should say, 'It does not surprise me,' or 'I do not wish to be married,' that is no rejection; and if she should afterwards consent, the contract would be valid. An adult virgin is married by the son of her paternal uncle to himself, and on the intelligence reaching her, is silent, but afterwards says, 'I am not content,' she is at liberty to do so, for her uncle's son is a principal on his own part, but only a *fuzoolee* on hers, that is, one acting

[1] Because the first dissent had put an end to it.

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without any authority; and the contract being incomplete, according to Aboo Huneefa and Moohummud, her silence was no consent. But if he should first consult her about marrying her to himself, and she should remain silent, whereupon he contracts her to himself, the marriage is lawful according to all opinions.

Disputes regarding a virgin's silence.

If a guardian should contract his ward in marriage without consulting her, and a dispute should afterwards arise, the husband saying, 'You received the intelligence of the marriage and were silent;' and she, on the other hand, insisting 'Nay, but I rejected,' her word is entitled to preference.[1] Whereupon, if he can prove her silence at the time of receiving the intelligence, she is his wife; otherwise there is no marriage between them. According to Aboo Huneefa, she is not liable to be put upon oath; but according to the disciples she is liable; and the *futwa* is in accordance with their opinion.[2] And if she refuse the oath, judgment is to be given against her on the ground of her refusal. If the husband offer proof of her silence at the time of receiving the intelligence, and she offer proof of her rejection, her proof is to be preferred. But if the proof tendered by the husband be that she sanctioned the marriage on being informed of it, and she tenders proof of her rejection of it at that time, his proof is to be preferred. If she were a virgin, and her husband having consummated with her, she should say, 'I was not content,' she is not to be believed, for permission to consummate is in itself consent. The case would be otherwise if the consummation were against her will, for then it would be no proof of her consent. But if, after permitting consummation, she should tender proof of her rejection, though it is stated in one authority that her proof should be received, yet it is more correct to say that it should be rejected; for her permission is as good as an acknowledgment of consent, and if after acknowledgment she were to bring a

[1] That is, the burden of proof is on the husband.

[2] When a plaintiff has no proof, he is commonly entitled to the oath of the defendant.

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suit on the ground of rejection, the suit itself would be invalid and her proof rejected, so also should it be in this case. The word of a guardian is not to be received against his ward as proof of her consent; for that would be to establish a husband's power over her by a guardian's declaration, and his declaration cannot establish a marriage against her after she has attained to puberty.[1] A man contracts his adult daughter in marriage, and it is never determined till the death of her husband whether she assented to or rejected the marriage; his heirs then allege that she was married without her authority, knew nothing of the transaction, and never consented to it, and has, therefore, no right to any share in the inheritance; the woman insists, on the other hand, that the contract was entered into by her father with her authority; in these circumstances her word is to be preferred, and she is entitled to a share in the inheritance, being also obliged to observe an *iddut*. But if she were to say, 'My father, indeed, contracted me in marriage without my authority, but on receiving the intelligence I declared my consent,' she would not be entitled to her dower nor to any share in the inheritance.

How a *suyyib's* consent is to be given.

When a *suyyib* is asked for permission to contract her, or when informed that she has been contracted, her consent must be verbally expressed. And as her consent is established by speech, for instance, when she says, 'I have consented,' or 'accepted,' or 'approved,' or the like; so, also, it is manifested by her asking for her dower or maintenance, or permitting matrimonial intercourse, or accepting congratulations, or laughing from satisfaction, not in jest. But if a *suyyib* be contracted in marriage, and accept a present after the contracting, or partake of her husband's food, or serve him as before, this is not consent. But if he were to retire with her, and

[1] That is, he has no power as guardian to contract her against her will, and so put her under subjection to a husband; but if his declaration could produce the same effect, it would, in fact, be a covert way of giving him the power.

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she consenting, would that amount to recognition of the marriage? There is no report upon this point, but, in my opinion, it would be so.[1]

A woman may sometimes be treated as a virgin, though not so physically.

If the signs of virginity be lost by jumping, or during the courses, or by a wound, or by long abstinence from marriage, the woman is still to be accounted a virgin; and so, also, according to Aboo Huneefa, if they be lost by illicit intercourse; but both the disciples were of opinion that in such a case silence would not be sufficient evidence of consent. And if she were actually turned out of doors, and subjected to *hudd* or the specific punishment for such intercourse, it is quite correct to say that silence would not be sufficient; so, also, if she is habitually addicted to the vice.

Virgin wife.

A virgin whose husband has died after retirement with her, but before actual consummation, is still to be treated as a virgin when she enters into another marriage; and the rule is the same with regard to one who has been judicially separated from an impotent husband. But if a woman lose her virginity by an invalid marriage, or by being compressed by mistake, she marries subsequently as a *suyyib*.

[1] The *Zuheereeah* is cited, and the opinion is probably that of the author.

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CHAPTER V.

OF EQUALITY.

Husbands should be the equals of their wives.

He has said on whom be blessings and peace,[1] that 'women are not to be married except to equals.'[2] To make marriages binding, the husbands should be the equals of their wives; that is, not inferior to them. But it is not required that the wives should be the equals of their husbands. Hence, if a woman should marry a man better than herself, a guardian has no power to separate them; for he is not disgraced by a man having subject to him one who is not his equal.

1. In respect of lineage.

Equality is to be regarded in several particulars. Among these are, first, descent or lineage. Among Koreishites all are equal; so that one who is not of the family of Hashim[3] is the equal of a Hashimite; but an Arab who is not a Koreishite, is not the equal of a Koreishite; while, among the other Arabs, one is equal to another, the Ansar[4] and the Mohajirite[5] being in this alike. The Bunnoo Bahalu[6] are not on an equality with the

[1] The Prophet.

[2] *Hidayah*, vol. ii., p. 49.

[3] He was the grandfather of the Prophet, and of the tribe of *Koreish*, which was considered the noblest in that part of the country.

[4] Literally, assistants. Those of Madeena, who aided the Prophet after his flight from Mecca, called the Hegira, and adopted as the commencement of the Moohummudan era.

[5] Refugees. Those who accompanied him in his flight.

[6] Tribe of Bahalu. She was a woman of Humadan, who lived under the protection of Maad, a descendant of Kees. Their children were said to take their lineage from her (*Inayah*, vol. ii., p. 44), and were notorious for their vices (*Kifayah*, vol. ii., p. 50).

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general body of the Arabs; and it is correct to say that all Arabs are equals, as Aboo'l Yusur has stated in his Mubsoot. *Mowallees* (who are all persons other than the Arabs) are not the equals of Arabs, but among themselves one is the equal of another. It has been said that one distinguished by merit is the equal of one of high lineage, so that a lawyer is the equal of a woman descended from Aly. Kazee Khan and Atabee have reported this; and in the Yoonabia a learned man is said to be the equal of such a woman; but it would be more correct to say that he is not her equal.[1]

2. In respect of Islam of paternal ancestors.

The second particular in which equality is to be regarded is the *Islam* of paternal ancestors. One who himself has embraced the faith, and whose father was not a *Mooslim*, is not the equal of a person who has had one paternal ancestor a *Mooslim*; and a person who has had only one such ancestor a *Mooslim* is not the equal of a person who has had two or more such ancestors *Mooslims*. A man who has himself embraced the faith is not the equal of a woman who has had two or more paternal ancestors *Mooslims*, but is the equal of one like himself; that is, when they are living among people who had long previously become *Mooslims*; but if their adoption of the faith is only recent, so that the distinction is not a reproach, one party is the equal of the other. A man who has had two paternal ancestors in the faith is the equal of a woman who has had three or more, for descent or lineage is completed by father and grandfather. A man who has apostatized from the faith, but returned to it, is the equal of a person who has never fallen into apostacy.

3. In respect of freedom.

The third particular in which equality is to be regarded is freedom; and a slave, whoever he may be, is not the equal of a free woman, nor one whose father was emancipated the equal of a woman free by origin, that is, a woman whose father and grandfather were free.[2] A

[1] The *Ghayut-ool-Surwujee* is the authority cited, and apparently adopted by the compilers of the *Futawa Alumgeeree*.

[2] *Inayah*, vol. ii., p. 45.

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freed man is the equal of one like himself. But one whose father was emancipated is not the equal of a woman two of whose paternal ancestors were free. A man who is free by origin through father and grandfather—that is, one whose grandfather was born free and a *Mooslim*, is the equal of a woman whose paternal ancestors were free and *Mooslims*; but if his grandfather had been emancipated, or an infidel converted to the faith, he would not be her equal. And a freed man is not the equal of a woman whose mother was free by origin and father a freed man. On this point, however, it is said that there is no report. The freed woman of a noble tribe is not the equal of the freed man of an ignoble person, for *wula* is like lineage; so that if the freed woman of a Hashimite were to marry herself to the freed man of a mere Arab, her emancipator would have a right to object. The freed woman of a noble tribe is the equal of Moowallee.

Two last particulars applicable to *Ajimees*.

Equality in respect of freedom and *Islam* are to be regarded in the case of *Ajimees* (Persians), for they pride themselves in these distinctions and not in lineage. But in the case of Arabs, the *Islam* of a father is not a condition of equality. So that if an Arab whose father was an infidel should marry an Arab woman whose paternal ancestors were *Mooslims*, he is her equal; but freedom is indispensable to an Arab, for it is not lawful to reduce Arabs to slavery.

4. Equality in respect of property.

Fourthly, regard is to be had to equality in respect of property; by which is meant that a man should possess enough to pay the dower and provide for the maintenance of his wife. This is what is required in the Zahir Rewayut; so that if a man should not have enough for both of these purposes, or should not have enough for one of them, he is not the equal of his wife, whether she be rich or poor. No regard is had to anything beyond this; so that if he should have enough for these two objects, he is to be considered her equal in respect of property, though she were a person of great wealth. If he should be able to maintain her out of his gains, but have no means of paying her dower, our doctors differ as to the legal effect

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of such partial ability, but the generality agree that he would not be her equal. By 'dower' is to be understood that part of it which is prompt, which again is to be determined by custom,[1] and no regard is to be had to the remainder, even though it were presently payable under the actual agreement. With regard to maintenance, Aboo Nusr has said that it must be understood as food sufficient for one year, but Naseer used to say food for one month, and this is more correct. And it is reported as from Aboo Yoosuf, that when a man is able to pay the dower, and makes from day to day enough to support his wife, he is her equal, and this is correct. The ability to maintain a wife is required only when she is a grown woman, or, if a young girl, when she is fit for matrimonial intercourse; for if she be young and unfit for that purpose, she has no right to maintenance, and it is enough if the husband can pay the dower. A poor man marries, and his wife abandons or gives up her claim to the dower, but this does not make him her equal, for regard must be had to his condition at the time of the contract. A man contracts his young sister to a youth who is able to maintain her, though not to pay the dower, but his father, who is rich, approves of the marriage; this renders it lawful, for a person is accounted rich in respect of dower on the ground of his father's wealth; but not so in respect of maintenance, as it is a common practice among men for fathers to take upon themselves the dower of their young sons, but not their maintenance. Though a man be in debt to the amount of the dower, yet he may still be an equal, for it is optional with him to pay whichever debt he pleases.

5. In respect of piety and virtue.

Fifthly, equality is to be regarded in respect of piety and virtue, according to Aboo Huneefa and Aboo Yoosuf, and this is valid. A profligate, therefore, is not the equal of a good woman, whether his profligacy be notorious or not. A person marries his young daughter to a man, supposing him to be virtuous, and not a drinker of wine, but

[1] See *post*, p. 127. The *Tibyeen* is the authority cited.

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afterwards finds him to be an habitual drunkard, and the girl on attaining to puberty declares that she is not content with the marriage; in these circumstances, if the father was not aware of his being a drinker of wine, and if the persons of his family generally were known to be virtuous, the marriage is void, or will be annulled; and all are agreed upon this point. There is a difference of opinion between Aboo Huneefa and his two companions with regard to the marriage by a father of his daughter to a man whom he knows to be not her equal. According to Aboo Huneefa the marriage is lawful, because a father being zealous and diligent for his daughter's interest, must be presumed to have given the fullest consideration to the matter, and to have taken the person who is not her equal as being on the whole better than an equal. Equality in this particular is required at the commencement of the marriage, without reference to its permanence. So that if a man were the equal of his wife in piety and virtue when he married her, but should afterwards become depraved, that would be no ground for cancelling the marriage.

6. In trade or business.

Sixthly, equality is to be regarded in trade and business. Aboo Huneefa, according to the report in the Zahir Rewayut, was of opinion that no regard should be paid to difference of business, and that a horse-doctor is the equal of a perfumer. But, according to Aboo Yoosuf and Moohummud, and another report of Aboo Huneefa's opinion, the professors of low trades, such as horse-dealers, cuppers, weavers, sweepers, and tanners, are not the equals of perfumers, drapers, and bankers;—and this is correct. In like manner, a shaver is not their equal. It is reported on the authority of Aboo Yoosuf, that when trades are nearly on a footing of equality, the difference between them should not be taken into consideration, and they are to be regarded as equal. Hence a weaver is the equal of a cupper; the tanner, of the sweeper; the brazier, of the blacksmith; and the perfumer, of the draper. And according to Hulwaee, the *futwa* is in accordance with this view.

Equality is not

Beauty is not taken into account as regards equality.

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Opinions differ as to understanding; some say that it is not to be regarded in a question of equality. required in respect of beauty.

When a woman has contracted herself in marriage to a man who is not her equal, the marriage is valid according to Aboo Huneefa, as reported in the Zahir Rewayut, and also according to the latest opinions of Aboo Yoosuf and Moohummud. So that before an actual separation of the parties, the case admits of repudiation in the ordinary form, or by *Zihar* or *Eela;* and reciprocal rights of inheritance ensue. Her guardians, however, have a right to object to the marriage. It is reported by Aboo Husn, as from Aboo Huneefa, that the marriage is not contracted: and many of our doctors have adopted his report. In our time, the report of Husn is preferred for the *futwa*; and the Imam Surukhsee has said that it is more cautious to abide by it.[1] In the Buzzazeeah it is also reported that the *futwa*, as to the legality of the marriage, be the woman a virgin or *suyyib*, is according to the saying of the great Imam; that is, when the woman has a guardian; but if she have none, the marriage is valid according to general agreement. Marriage by a woman to one not her equal is valid; but may be objected to by her guardians.

To make a separation for this cause—that is, inequality—it must be done before the judge; and, without cancellation by a judge, the marriage between the parties is not cancelled.[2] The separation, however, is not a repudiation; so that if the husband has not consummated with her, she is not entitled to any part of the dower.[3] But if he have consummated, or if a valid and complete retirement has taken place, he is liable for the whole of the Objection must be made before a judge, to effect a separation. The separation is not a repudiation, though

[1] The reason for his opinion, given in the *Kifayah*, is that it is not every guardian who thinks it proper to bring such a matter before the judge; nor is every judge just; and it is therefore better to shut the door against such marrying (vol. ii., p. 35). The same reason is obscurely given in the *Hidayah* (original) for the different report of Aboo Huneefa's opinion.

[2] It must, therefore, have been valid in the first instance; and it is evident that the compilers, as well as the author of the *Hidayah*, give the preference to the report of the Zahir Rewayut.

[3] If it were a repudiation she would be entitled to half the dower.

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resembling it in some of its effects.

dower specified, and for maintenance during the *iddut*, the observance of an *iddut* being incumbent on the woman.[1] And when a woman has married a man who is not her equal, and the judge, after consummation, has decreed a separation between the parties at the suit of the guardian, awarding payment of the dower against the man, and the observance of an *iddut* upon the woman, and subsequently to all this the man marries her again during the *iddut*, without the consent of her guardian, and the judge again separates them before a second consummation, the woman is entitled to a second full dower, and must observe another *iddut*, according to Aboo Huneefa.[2]

All guardians are competent to object.

According to some of the learned it is only *Mooharim* (or relations within the prohibited degrees) that are entitled to raise the question before the judge; but, according to others, there is no difference between *Mooharim* and other guardians in this respect; so that the son of a paternal uncle and the like are equally entitled to raise the question; and this opinion is sound. But the power does not belong to mere maternal relatives, and is confined exclusively to the *âsubat*, or agnates.

Tokens of consent by guardian.

When a woman has married herself to a man not her equal without the consent of her guardian, and the guardian takes possession of the dower and provides her *juhaz*,[3] this amounts to consent and acquiescence upon his part; and if he were only to take possession of the dower without providing the *juhaz*, though there is a difference of opinion on the point, yet, according to the sounder view, that would still be consent on his part, and acquiescence in the contract.

Guardian may object till the birth of a child.

The delay of a guardian to sue for a separation does not annul his right of cancellation, even though it were prolonged till the woman gives birth to a child. But after

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[1] These effects would be the same if the separation were a repudiation.

[2] This is the case also after divorce. See *Hedaya*, vol. i., p. 367.

[3] Paraphernalia, or a portion given to a daughter; whatever a bride brings with her to her husband's house.

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the woman has actually borne a child to her husband, the guardians have no longer the right to cancel the marriage; it is stated, however, in the Mubsoot of Sheikh ool Islam, that when a woman has married herself to a man not her equal, and her guardian, being aware of the fact, has remained silent till she has borne several children, and then begins to litigate the matter, he has still power to separate the parties.[1]

Consent by one guardian binds himself and others more remote.

When a woman has married herself to a man who is not her equal, and one of her guardians has given his consent, it is no longer in the power of that guardian, or of any other equal to or below him, to cancel the marriage; but one superior to him may still do so. The rule is the same when one of the guardians has contracted her with her consent. And when a guardian contracts a woman in marriage to a man not her equal, who consummates with her and then repudiates her absolutely, after which she contracts herself again in marriage to the same man, without the concurrence of her guardian, the same guardian is at liberty to cancel the marriage. The case would be different if the repudiation were revocable and the husband should recall her, for then the guardian would have no right to separate the parties. It is stated in the Moontuka of Ibn Sumáât, that a woman being under or subject to a man who is not her equal, the matter is contested by her brother in the absence of her father, who is at such a distance as precludes his attendance; or it is contested by another guardian, besides whom there is one nearer in degree but he is at a precluding distance; and the husband pleads that the nearer or superior guardian had contracted her to him in marriage; in these circumstances he is to be directed to produce his proof, and if he do so it is to be received and taken as against the superior guardian; otherwise the parties are to be separated. It is also related in the Moontuka, as upon the authority of Aboo Yoosuf, that

Consent of a nearer guardian may be pleaded in his absence to objection made by one more remote.

Consent of a guardian once given

[1] The Nihayah is cited, and the author's own opinion seems to be contained in the first part of the extract, and it is confirmed by that of the author of the *Kifayah*, who gives as a reason, 'that the child may not be injured.'—Vol. ii., p. 35.

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is not affected by a change in his relation to the party.

when a person has married his young slave girl to a man, and then claims her as his child, her descent is established, and she remains as before if the man were her equal; and though he were not her equal, the marriage would be binding by analogy, because the person who contracted her was her guardian. Even supposing that he should sell the slave, and the purchaser were to claim her as his daughter, the result would still be the same if the husband were her equal; and, indeed, ought to be so also by analogy though the man were not an equal, because a guardian-proprietor had contracted her in marriage.

A guardian has no option with regard to a contract made by himself, unless equality is stipulated for, or the husband represents himself to be the equal of the wife.

A slave marries a woman with the permission of his master, without stating at the time of the contract whether he is free or a slave, and neither the woman nor her guardian has any knowledge of the fact, but it afterwards transpires that he is a slave; in these circumstances, if it were the woman herself who made the contract, she has no option, but the guardian is at liberty to cancel it, and if it were the guardian who made the contract neither she nor he has any option in the matter. In like manner, if the slave had stated that he was free, all the other circumstances being the same, the guardian would have an option. From this case it is manifest that if a woman should contract herself in marriage to a man, not knowing whether he is her equal or not, and not stipulating for equality, and should afterwards be informed that he is not her equal, she has no option, but her guardians have an option;[1] and that if the guardians are the parties who enter into the contract on her behalf, and with her consent, being themselves ignorant whether the man was her equal or not, none of them has any option in the matter, unless equality is expressly stipulated for, or the guardians are told that the man is the equal of the woman, in which case, if it should subsequently transpire that he is not her equal, they would have an option. And the Sheikh ool Islam being asked with regard to a person of unknown descent whether he is the equal of a woman

[1] That is, if the contract was made by the woman.

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whose descent is known, answered in the negative. But suppose that the husband has assumed a lineage different from his own, and that his true lineage turns out to be inferior to what he assumed, and unequal to the woman's, in that case all, that is, both the woman and her guardians, would have the right to cancel the marriage; while, if the true lineage should be equal to that of the woman, she only, and not her guardian, would have the right of cancellation, and if it prove to be superior to what he asserted it to be, neither she nor they have that right. If it be the woman who is the deceiver of the man, by setting up a lineage different from her own, the husband has no option, and she remains his wife, to hold by or repudiate as he may think proper. If a woman should marry on a condition that the man is such an one, the son of such an one, and he proves to be only the half-brother by the father, or the paternal half-uncle by the father of the person indicated, she has the right of cancellation. A man marries a woman of unknown descent, who is then claimed as his daughter by a man of the tribe of Koreish, and her descent is established before the judge, who decrees her to be his daughter, and the husband is a barber. Such a father may separate the man from his daughter. But suppose the case to be different, and that the woman acknowledges herself to be the slave of another person, her master would not have the power to cancel the marriage.

Case of assumed lineage by the husband proving false.

When a woman has married herself to a man who is not her equal, can she refuse her person till her guardians give their consent? The lawyer Aboo Leeth used to decide in favour of her right to do so; but this is contrary to the Zahir Rewayut, and many of our doctors decide, agreeably to the latter, that she cannot refuse herself.

A woman unequally matched by herself, cannot refuse her person to her husband.

If a woman should marry for less than her proper dower, the guardian may object till the full amount of the dower is made up, or he may separate her from her husband; and when the separation takes place before consummation she is not entitled to any part of the dower; but if it should take place after consummation, she would be entitled to the full amount specified.

A marriage entered into by a woman at an inadequate dower may be objected to by her guardian.

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So also if one of the parties should die before a separation. This, however, was only the opinion of Aboo Huneefa, and according to his two companions, the guardian has no right to object. It is to be observed that this separation can be effected only before a judge, and that until the judge has pronounced a decree for a separation, the case admits of repudiation in the ordinary form, or by *Zihar* or *Eela*, and that the right of inheritance remains in full force.

Effect of duress when contract is made by a guardian and duress restricted to him,

when extended to the woman.

When the Sultan compels a man to give his ward in marriage to one who is her equal for less than her proper dower, the woman herself assenting, and the constraint is then withdrawn, the guardian may sue the husband either to make up the dower to the proper amount, or for a separation; (though, according to Aboo Yoosuf and Moohummud, the guardian has no right in the matter.) And in like manner, when the woman is unwilling, and the coercion is subsequently removed, both she and the guardian have the right of contesting the matter, according to Aboo Huneefa. In the opinion of the other two, however, this right belongs exclusively to the woman.

Where a woman is constrained to marry herself to an equal she has no option on the restraint being removed.

Otherwise when he is not her equal.

When a woman is obliged to marry herself to a man who is her equal, and at a suitable dower, she has no option on the compulsion being withdrawn. But if the man is not her equal, or the dower is less than the proper amount, and she is compelled to contract herself, she has an option on the removal of the constraint. When a woman is constrained to enter into a marriage, and does so, the contract is lawful, and no responsibility attaches to the compeller. If the husband be her equal, and the specified dower more than or equal to that of her equals, it remains lawful; but if the specified dower be less than that of her equals, and she demands that it be made up to the proper amount, the husband may be required to complete it or separate from her. If he completes the dower to the proper amount, good and well; if not, and he separates from her before consummation, he is not liable

[1] That is, full dower would be due in that case.

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for anything. If consummation has taken place and it was against her will, that would be equivalent to an assent on his part to complete the dower, while, if the consummation was with her consent, that would be an acquiescence on her part in the specified dower. It would still, however, be open to the guardians, according to Aboo Huneefa, to object, though in the opinion of the other two, they would have no such right. All this is on the supposition that the husband is her equal. But when he is not her equal the guardians may separate between the parties; and if the husband have consummated with her against her will, he is liable for the full dower of her equals, the right of the guardians to object to the marriage remaining intact; while, if the consummation were with her consent, he would be liable for no more than the dower specified, that being tantamount to assent on her part to the marriage; for the surrender of her person is as much a sanction of the contract as her words 'I am content,' and both her options, viz., that to separate on account of inequality, and that to require the completion of her dower, would fall to the ground; while the options of her guardians to separate on account of inequality, or for deficiency of dower, would remain intact according to Aboo Huneefa, but according to the other two they would have no more than the option. To separate on account of inequality, and supposing the separation to take place before consummation, the husband would not be liable for anything.

Unsuitable marriage by a father on behalf of his young child.

If a man should marry his young child to one who is not an equal, as, for instance, to a slave, whether the child be a son or daughter; or should marry the child at an improper dower, as, for instance, if the child be a daughter at less than the dower suitable to one of her condition, or if the child be a son at a dower in excess of what is proper to the condition of his wife, the marriage is lawful according to Aboo Huneefa. But according to the other two, if the deficiency or excess be very glaring, it is not lawful. The doctrine of Aboo Huneefa, however, in the matter, is the more sound. Upon this point they were all

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agreed, that it is only a father or grandfather who can lawfully enter into such a contract, and that a judge cannot. The difference between them has reference only to a case where it is not known that the father acted carelessly or wickedly in the matter; but where this is known, the marriage is void according to all their opinions; and in like manner, they are agreed that if he were drunk at the time of contracting his child in marriage, the contract would not be lawful. When the excess or deficiency in the dower is within reasonable bounds, the marriage is also lawful according to general agreement. And it would be so whoever the guardian might be who made the contract, whether a father, grandfather, or any other.

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CHAPTER VI.

OF AGENCY IN MARRIAGE.

An agent in marriage must contract in the name of his principal,

[1] THERE are some contracts, such as sale, purchase, and hiring, which an agent is under no necessity of referring to his principal, but may contract in his own name; and in these, the rights and obligations of the contract are the agent's, in the same way as if he were the principal, and the principal a stranger.[2] There are other contracts, in which the agent is no more than a negotiator, and the principal himself must be referred to as the contracting party, and he alone is entitled to the rights and liable to the obligations of the contract.[3] Marriage, which is frequently effected through an agent on both sides, and almost invariably so on the part of the woman, belongs to the latter class of contracts.[4] Hence, the marriage agent of a man cannot be called upon to make good the dower; nor is the marriage agent of a woman entitled to receive it, or bound to make delivery of her person.[5] The appointment of an agent for marriage may be general, so as to include the power to select a husband or wife; or it may be special, for the purpose of contracting a marriage that has been already agreed upon between the parties.

who is alone entitled to its rights, and liable for its obligations.

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[1] The first three paragraphs are an addition to the original digest in this place.

[2] *Fut. Al.*, vol. iii., p. 667.

[3] Ibid., p. 668.

[4] *Hedaya*, vol. i., p. 117.

[5] *Fut. Al.*, vol. iii., p. 667.

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Marriage may be contracted by a *fuzoolee*, or person acting without any authority.

In both the classes of contracts which have been referred to, a *fuzoolee*, or person wholly unauthorized, may take upon him to act for one of the parties; and the contract is effected, but in dependence on the approval of the party for whom he has acted. Until confirmed by him, it is not binding on the other party, who may therefore retract. In sale, the *fuzoolee* has also the power to retract;[1] but it does not follow that he should have the like power in marriage, which is a contract of a different class; nor even that a duly authorized agent, who has entered into a contract of marriage for his principal with a *fuzoolee*, should in all cases have the power of cancelling the contract without referring to his principal.

The following cases, which have been selected from a great number in the *Futawa Alumgeeree*, relate to the construction to be put on general and special powers of agency in marriage, and the ratification of contracts that have been entered into by *fuzoolees*: to which is added a short section on the cancellation of such contracts.

A marriage agent may be appointed without witnesses.

The appointment of an agent for marriage is valid without witnesses.

He cannot contract his principal to himself,

When a woman says to a man, 'Marry me to whomsoever you please,' this does not authorize him to contract her to himself. A man appoints a woman his agent to contract him in marriage, and she does so to herself, this is not lawful. When a woman has appointed a man her agent for the general management of her affairs, and he marries her to himself, whereupon she says, 'I intended only buying and selling,' the marriage is not lawful; for even if she had appointed him her agent for marriage, he would not have been authorized to marry her to himself: and the case is stronger here.

unless specially authorized;

A woman appoints a man to marry her to himself, and he says, 'I have married such an one to myself,' the marriage is lawful, even though he should not add, 'I have accepted.'[2]

[1] *M. L. S.*, p. 221.

[2] As to a person acting for both parties, see *post*, p. 84.

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A man directs another to contract him in marriage, and he does so to his own little daughter, or to the little daughter of his brother (he being her guardian), this is not lawful. So also with regard to any other for whom he has power to act without her authority. But if he should marry the man to his grown-up daughter with her own consent, though it is stated in the Asul that, according to Aboo Huneefa, the marriage would not be lawful, unless assented to by the husband; yet in the opinion of the other two it would be lawful: and if the woman were the agent's grown-up sister, and he had married his principal to her with her own consent, the marriage would be lawful, without any difference of opinion.

nor to any one for whom the agent can act on his own authority.

When an agent on the part of a woman marries her to his own father or son, the marriage is not lawful according to Aboo Huneefa. And if the son be a child, it is unlawful without any difference of opinion.

The agent of a woman cannot contract her to his own father or son, nor to any one who is not her equal; but mere personal defects are no objection either in the man or woman selected.

When a marriage agent on the part of a woman contracts her to a person who is not her equal, the marriage is unlawful according to all opinions; and this is correct. But if the party be her equal, though blind, or lame, or a boy, or lunatic, the marriage is lawful. So also even though he should be an eunuch or impotent. And if a marriage agent on the part of a man should contract him to a woman who is blind, or has a withered hand, or is physically impenetrable, or mad, or a child, whether capable or incapable of coition, or free or a slave, equal or unequal, *Mooslim* or *Kitabee*, the marriage is lawful according to Aboo Huneefa.[1] But if the agent should marry him to a slave of his own, it would be unlawful according to all their opinions. A person appoints another his agent to marry him to a woman, and he does so to one whom the principal had himself repudiated before the appointment; the marriage is lawful, however,

[1] This indicates a difference of opinion on the part of the disciples, but it appears from the *Hedaya*, vol. i., p. 121, that it was confined to the case of marriage to a slave; and the author in stating the reason for the opinion of Aboo Huneefa seems to identify himself with it, by using the expression '*we* say.' Original, vol. ii., p. 57.

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unless the principal had previously complained to him of something bad in her disposition; but if the repudiation should not take place till after the appointment, the marriage would not be lawful. And in like manner, if the agent should marry his principal to one from whom he had separated by *eela*, or who was in her *iddut* for him, the marriage would be lawful. But if the woman were actually the wife of another, or observing *iddut* on account of another, the parties must be separated; and if the principal had consummated with her, though in ignorance, he would be liable to her for whichever might be the less, of her proper dower, or the dower mentioned in the contract, without, however, any right of recourse against the agent, whether he had acted knowingly or in ignorance. And the result would be the same if the agent should marry him to the mother of his wife.

How instructions are to be construed when they are restricted to a particular description of woman.

A man directs an agent to marry him to a white woman, and he marries him to one that is black, or *vice versâ*, the contract is not valid; but it would be valid if the direction were for a blind woman, and the agent should marry him to one having sight. An agent is directed to marry his principal to a slave, and he marries him to a free woman; this is not lawful; but it would be so if the woman were a *Mookatubah*, *Moodubburah*, or *Oom-i-wulud*. When an agent for an invalid marriage makes one that is lawful, it is not lawful. A person is appointed to marry another to one of his tribe or family, but he marries him to one of a different family; the marriage is not lawful. So also if the authority were to marry him to a woman of a particular town or family, and the agent should marry him to one of a different town or family, the marriage would not be lawful.[1]

When they involve an authority to the woman to repudiate herself.

When a man says to another, 'Marry me to a woman, and when thou hast done so her business is in her hands,' and the agent then marries him to a woman, but without making any stipulation to that effect in her favour, the

[1] *Fut. Al.*, vol. iii., p. 714.

[2] See *post*, Book iii., Cap. iii., Sect. 2.

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business is nevertheless in her hand. But if he had said, 'Marry me to a woman, and stipulate in her favour that when thou hast married her her business is in her own hands,' and the agent should then marry him to a woman, her business would not be in her hands unless the stipulation were actually made. And if a woman should appoint a man her agent for marriage, and he should stipulate on her behalf, as against the husband, that when he, the agent, shall have married her to him, her business will be in her own hands, and the agent should thereupon marry her to the man, the marriage would be lawful, and the business would be in her hands from the time of the marriage.[1]

When they are for one woman,

A man directs another to marry him to one woman, and he marries him to two women by one contract, the principal is not bound as to either. But if he should allow the marriage as to both or either, the marriage so allowed would become operative. And if there had been two distinct contracts the first would be binding, and the second suspended on his sanction. If an agent be appointed to marry a man to a particular woman, and he marries him to that woman and another with her, the marriage is valid as to the former; and if the agent were appointed to marry him to two women in a contract, and he should marry him to only one, the marriage would be lawful. And in like manner, if the appointment were to marry him to '*these* two women in a contract,' and he should marry him to only one of them, for making a separation in the contract is not acting contrary to instructions, unless the principal had said, 'Do not marry me except to two by one contract,' when, if the agent should marry him to one, the marriage would not be binding. If he should say, 'Marry me to *these* two sisters,' it would be a permission as to one of them, unless he had said, 'in a contract.' And if the words were 'these two in a contract,' and they should happen to be sisters, it would be lawful to make a separation in the contract, unless he had actually forbidden it.

or for two.

When they

If a person should appoint an agent to marry him to

[1] See *ante*, p. 19, as to the legality of such stipulations.

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are restricted to a particular woman,

such an one, and the woman proves to have a husband, but he dies, leaving her a widow, or repudiates her, and her *iddut* having passed, the agent then marries her to his principal, the marriage is lawful. A person appoints an agent to marry him to a particular woman, and the agent marries her himself, this marriage is lawful; and if the agent should live with her a month, consummate with her, and then repudiate her, and after the expiration of her *iddut* should marry her to his principal, the marriage would be lawful. But if instead of the agent's marrying her, the principal should himself marry, and then irrevocably repudiate her, and the agent should afterwards marry him to the woman, the contract would not be lawful.

but silent as to her dower,

When a man appoints an agent to marry him to a particular woman, and he does so for more than her proper dower, if the difference be not excessive the marriage is lawful, without any difference of opinion; while, if it be beyond the reasonable limits of error in such circumstances,[1] though the result would be the same according to Aboo Huneefa, the marriage would not be lawful according to the other two.

or restricted as to its amount.

If one should appoint an agent to marry him to a particular woman for a thousand *dirhems*, and the agent should do so for two thousand, the marriage would be lawful if allowed by the husband, but void if rejected by him. If the husband, in ignorance that the agent had exceeded his instructions, should proceed to consummate the marriage, he would still have his option of confirming or rejecting it; and if he should elect to confirm it, he would be liable for the whole sum mentioned; while if he should reject the marriage, it would be void, and he would be liable for no more than the proper dower, if that were less than the sum mentioned; otherwise he would be liable for the whole sum. If the husband should be unwilling to pay the excess, and the agent should say, 'I will be debtor for it myself, and

[1] Arab., *Yutaghabun-oon-nass*, which is described in the *Tarifah* as something beyond what a valuator would determine to be proper in the circumstances.—*Freytag.*

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render the marriage obligatory on you both,' it would not be in his power to do so.

When they are general as to the person, but restricted as to the dower.

A person appoints a man his agent to marry him to a woman on a dower of a hundred, with a condition that the prompt shall be twenty and the deferred eighty,[1] but the agent makes the prompt thirty; the contract is not valid, and is suspended for the sanction of the husband. If he should proceed to consummate in ignorance of what was done by his agent, the contract would not take effect; but if he should consummate with knowledge of the fact, that would be an allowance of the marriage. A woman directs a man to contract her in marriage for two thousand, but he does so for one thousand, and, the woman being in ignorance of the fact, the marriage is consummated; she may, however, still reject it, and is entitled to her full proper dower, whatever that may amount to. A man appoints an agent to marry him to a woman for a thousand *dirhems*, and the woman refuses until the agent adds a piece of cloth of his own; the marriage is suspended on the sanction of the husband, for the agent has acted contrary to his instructions, and the husband might be endamaged thereby, since if another party should afterwards establish a right to the cloth, the husband would be liable for its value, not the agent, who acted gratuitously in the matter, and, therefore, could not be made responsible. If the husband should not be informed of the addition made to the dower by the agent until he had consummated with the woman, he would still have an option; for consummation in such circumstances would not be an assent to the agent's departure from his instructions, and he might either hold to his wife or separate from her; but if he should separate from her, she would be entitled to whichever may be the less of what was mentioned to her by the agent, or her proper dower.

Case of

A person appoints an agent to marry him to a woman,

[1] It is a very general custom in Moohummudan countries to divide the dower into two parts, one termed *moowujjul* (or prompt), and the other *moowujjul* (or deferred), which are the terms used in the text.

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an agent contracting for a dower out of his own property.

and he does so for a slave, or a piece of land, of his own; the marriage is valid and operative, and the agent is bound to make delivery; and when he has done so, he has no right of recourse against the husband. Yet if the woman should not take possession of the slave, and he should die, the agent would not be answerable, and she must have recourse for the slave's value to her husband. And if the agent should contract his principal to the woman for a thousand *dirhems* of his own, by saying, 'I have married thee to this woman for a thousand of my own property,' or 'I have married thee to this woman for these two thousand,' the marriage would be lawful, and the husband liable for the dower indicated, which could not be demanded from the agent.

Miscellaneous cases.

A person appoints an agent to marry him to a woman to-morrow after sunrise, and he does so before sunrise, or on a subsequent day, the marriage is not lawful; but suppose that a woman should appoint an agent to contract her and take a writing for the dower, and that he does so without taking a written engagement for it, the marriage would, nevertheless, be lawful. A man says to another, 'Marry this, my daughter, to a man given to learning and religion, with the advice of such an one,' and the agent contracts her to a man answering the description, but without consulting with the person referred to, the contract is nevertheless lawful; for the object of taking his opinion was merely to ensure the prescribed qualities, and, as that object has been accomplished, there was no necessity for taking the person's advice. A man sends another to solicit a certain woman on his behalf, and the agent contracts him to her in marriage, the contract is lawful, even though it should be at a dower glaringly above the proper dower of the woman.[1] A man appoints another to solicit the daughter of such an one on his behalf, and the agent comes to the father and says, 'Give me your

[1] The difference between this and the case on page 80 seems to be that there the negotiation was already completed by the principal, but here the woman has still to be *solicited*.

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daughter,' and the father answers, 'I have given her,' this is a contract to the agent himself, even though he should add, 'I have accepted for such an one;' for as soon as the agent has said, 'Give me,' and the father, 'I have given,' the contract is complete. But if the agent should say, 'Give your daughter to such an one,' and the father should answer, 'I have given her,' there would be no contract until the agent add, 'I have accepted;' and whether he merely says, 'I have accepted,' or should say, 'I have accepted for such an one,' the contract would be to the principal in both cases. And though preliminaries had already taken place between the father and the agent for a marriage to his principal, and the father should say, 'I have married my daughter for such a dower,' without saying, 'to the speaker or to his principal,' and the speaker should answer, 'I have accepted,' there would be a valid marriage to the agent.

Agent cannot delegate his authority.

A marriage agent cannot delegate his authority to another; but if he should do so, and the delegate should make a contract in the presence of the original agent, it would be lawful. When a woman has appointed a man her agent to marry her, and has said, 'Whatever thing you may do is lawful,' the agent may lawfully appoint another to contract her in marriage, and if death were imminent, and he should bequeath the agency to another, and the second agent should contract her in marriage after the death of the first, the contract would be lawful.

When two agents are appointed, one cannot act alone.

When two agents are appointed by a man or a woman to contract him or her in marriage, and one of the two enters into a contract, it is not lawful.

Dispute between principal and agent as to the subject of the contract.

If a person should appoint another his agent to contract him in marriage to a woman, and the agent should do so, but the principal and agent should differ with regard to the woman with whom the contract was made, the husband saying, 'You married me to this woman,' and the agent, 'Nay, but to this other;' in these circumstances the statement of the husband is to be preferred if believed or assented to by the woman, because they are both agreed, or believe each other, as to the marriage, and it is

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established by their mutual belief. And this case is a precedent that marriage is established by mutual belief.[1]

Discharge of agent.

When a woman, after appointing an agent to contract her in marriage, makes a contract for herself, the agent is divested of his office, whether he be aware of the fact or not. But when formally discharged, his functions do not cease till he becomes acquainted with the fact, and if he should exercise them in the meantime by contracting her in marriage, the contract would be lawful. If the agent were appointed by a man, the appointment having reference to a particular woman, and the man should himself marry the mother or daughter of the woman, the agent would be discharged from his office. If an agent be appointed by a man to marry him to a particular woman, and she should apostatize and take refuge in a foreign country, but be subsequently captured and return to the faith, after which the agent should contract her to his principal, the marriage would be lawful according to Aboo Huneefa. When a man who has already four wives appoints an agent to marry him to a woman, the appointment is to be regarded as having reference to a time when it can be lawfully exercised, as, for instance, after he may absolutely repudiate one of his wives.

One person may represent both parties in a contract;

'Our' authorities are agreed that one person can act in a marriage as agent for both parties, or as guardian for both parties, or as guardian on one side and principal on the other, or agent on one side and principal on the other, or guardian on one side and agent on the other. But can one person act on both sides as a *fuzoolee*, that is, without having any authority, or as guardian on one side and *fuzoolee* on the other, or principal on one side and *fuzoolee* on the other, or as agent on one side and *fuzoolee* on the other, so as to make a contract that would be dependent on subsequent sanction? According to Aboo Huneefa and Moohummud, this cannot be done.

but not without authority from one of them.

[1] *Tusadook*, trusting in each other. The marriage is said to be established, that is, proved, not constituted. See *ante*, p. 17.

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Every contract issuing from, or initiated by a *fuzoolee*, for which there is a person competent to accept it, whether the acceptor be another *fuzoolee*, or an agent or the principal, is contracted, subject to approval. And the other side of the contract may stand over for acceptance during the meeting, but no longer. A man says: 'Bear witness that I have married such an one,' and the woman, on receiving the intelligence, allows the marriage, yet it is void; and, in like manner, if a woman should say, 'Bear witness that I have married myself to such an one who is absent,' and the man, on receiving the intelligence, should allow the marriage, it would be void; but in both cases, if a *fuzoolee* had accepted, there would be a valid contract according to 'our' masters, though dependent on the approval of the party concerned.

Contracts may be effected by *fuzoolees*, or unauthorized persons, subject to approval.

The ratification of a marriage contracted by a *fuzoolee* may be established by word or by deed. A man having married another to a woman without his permission, informs him of it, whereupon he says, 'What you have done is good,' or, 'May God bless us in it;' or, 'Thou hast done or said well.' All these expressions amount to an approval of the contract, unless it is evident that they were uttered ironically. And if he were congratulated by a number of persons on the occasion, and should accept their congratulations, that also would be an approval. A man contracts another to a woman without her permission, and she says, 'What he has done has not surprised me,' or, 'This matter does not come agreeably to me.' These expressions do not amount to an actual rejection of the contract, and if she should afterwards assent to it, the marriage would become operative. Acceptance of the dower is an approval, but acceptance of a gift is not. To send the dower is to approve by deed, but is it necessary that the dower should reach the woman? On this point there is a difference of opinion; and also with regard to retirement of the husband with the wife in private, which some have considered a ratification of the contract, but others not. If a *fuzoolee* should contract a man to four women by one contract, and to three sisters by another,

Marriages so contracted may be sanctioned by word or deed.

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and the man should repudiate one of the women, that would be an approval of the marriage with the set to which she might belong.

Allowance of contracts effected by *fuzoolees*, or unauthorized persons.

A *fuzoolee*[1] marries a man to ten women by separate contracts, and on the intelligence reaching them they all approve, the marriages of the ninth and tenth are lawful. And in this manner if each of ten men marry his daughter to one man, and the daughters being of mature age should approve all together, the marriage of the ninth and tenth is lawful; and if there were eleven men the marriage of the three last daughters would be lawful; and if there were twelve, the marriage of the four last would be lawful, and if thirteen the marriage of the last only would be lawful.[2] A *fuzoolee* marries a man to five women by separate contracts, he may approve as to four, and separate the fifth; and if a man should marry four women without their consent, and then other four, and then two more, the last two would be in suspense.[3] A *fuzoolee* marries a slave to two women by one contract; he then marries him to two others by one contract, and this with the consent of the women; the slave is then emancipated, and may allow the marriage of two of the women, either the first two or the second two, or one of the first two and one of the second two.[4] But if he should allow the marriage with three it would be void, while if he allowed the marriage of the fourth only it would be lawful; and if all the marriages had been comprehended in one contract the allowance would not attach

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[1] Some of the cases that follow are illustrative of the rules contained in the following section, and should be read in connection with it.

[2] In all the cases the husband acts for himself. While the marriages are all unconfirmed, he has the power of cancelling them either by deed or word, and his marriage of one above the legitimate number is a cancellation of the four preceding; so the marriage of the ninth is a cancellation of the second series of four, and the marriage of the thirteenth a cancellation of all the preceding.

[3] The rest being cancelled.

[4] The *fuzoolee* has not the power of cancelling, as will be seen hereafter; so that the whole four are in suspense on the sanction of the emancipated slave.

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or take effect as to any of them. When a slave marries three women by separate contracts, without the consent of his master, and the master then allows the whole, the third is valid. The principle is that allowance or confirmation comes into the place of the original contract with regard to that which is the subject of it, and if the subject were in such a state that if consisting of parts they could not have been joined together at the inception, so neither can they be joined at the confirmation, while if they could have been conjoined at the inception, so also may they be conjoined at the confirmation.[1] When a man is already married to a free woman, and a *fuzoolee* contracts him to a slave, and the free woman then dies, or when a man who is already married is contracted by a *fuzoolee* to the sister of his wife, and the wife dies, in neither case can the marriage be legalized; and, in like manner, if a man who has already four wives living should be contracted by a *fuzoolee* to a fifth, and one of the wives should die, he could not legalize the marriage; so, also, if a man should be married to five women at once, he could not legalize the marriage as to any of them.

Principle.

If a man should contract his adult daughter in marriage to another, who is absent, and a *fuzoolee* should accept for him, and the wife's father should die before the absent husband has signified his assent to the marriage, still it would not be rendered void by his death. And when a man has married the daughter of his brother to his own son (both being of tender age), and the father of the daughter, though alive at the time of the marriage, has died without confirming it, and the uncle then allows the marriage before the girl arrives at puberty, his allowance of it is valid, and the marriage operative. In like manner, when a man has united his adult son in marriage with a woman without the son's consent, and the son becomes mad before the intelligence reaches him, and the father then confirms the marriage, it is

Death of the other party, before the contract is allowed, does not invalidate it.

[1] The three women could not have been joined by the slave himself in one contract. See *ante*, p. 30.

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lawful. So, also, when a slave who has married without the permission of his master passes into the hands of another master who sanctions the marriage, the sanction is valid, and the contract operative; and, in like manner, with regard to a female slave, when she has married herself without the permission of her master, and then passes from his hands to the hands of another by sale, gift, or inheritance. But here it is only when the second master cannot lawfully have connection with her (as, for instance, by reason of his being only one of several persons who have inherited her, or, after having inherited her from a father who had connection with her), that he has the power of confirming the marriage. For, if the female slave be lawful to the second proprietor (as, for instance, when she has been given or sold to a stranger, or has been inherited by a son whose father had no previous connection with her), then the allowance by the second proprietor would not be lawful, nor would the marriage be rendered valid by his allowance.

Of Cancellations in connection with the Preceding Cases.

A *fuzoolee* has no power to cancel a contract of marriage, either by word or deed.

The contracting parties viewed with reference to their powers of cancellation are of four kinds. The first is the contractor, who has no power of cancellation either by word or deed; and he is the *fuzoolee*. Whenever, then, a person has married a man to a woman without his authority, and then says, 'I have cancelled the contract,' it is not cancelled; and, in like manner, if he should marry the man to the sister of the same woman, the second marriage would be in suspense, and there would be no cancellation of the first.

An agent who can cancel by word only.

The second is the contractor who cancels by word but not by deed; and he is an agent. A person appoints a man his agent to marry him to a particular woman, and he marries him accordingly to that woman, a *fuzoolee* answering on her behalf; this agent then has the power of cancellation by word;

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but if he should marry the same man to the sister of the woman, that would be no cancellation of the first marriage; though, if the agent should contract the woman herself in a second marriage, the first would be dissolved. The third contractor is one who possesses the power of cancellation by deed but not by word. The manner in which this happens, is as follows: A person marries a man to a woman without his authority; the man then appoints the same person his agent for marriage, without specifying any particular woman, and the person marries him to the sister of the first woman. The first marriage is in consequence cancelled; but if the person had attempted to cancel it by word, the cancellation would not be valid. The fourth contractor is he who possesses the power of cancellation both by word and deed; as, for instance, a man appoints an agent to marry him to a woman without specifying any one in particular, and he marries him to a woman for whom a *fuzoolee* answers in the contract; if then the agent should verbally cancel this contract, the cancellation would be valid, and if he should marry the man to the sister of the first woman, that also would cancel the first marriage. Thus, a *fuzoolee* in the matter of marriage, has no power to revoke before confirmation, but an agent has the power of revocation in cases of suspended marriage, both by word and by deed.[1] One of two agents for marriage generally has not the power to dissolve a marriage entered into by the other agent, and left by him designedly in suspense; but he has the power to dissolve it by contracting his principal in marriage with the woman's sister, or by renewing the first marriage at a different dower. If a person should marry a woman without her permission, and then appoint an agent to contract him in marriage, and the agent should (by speech) cancel what the husband had done, it would

One who cancels by deed only.

One who can cancel by both.

[1] That is, a general agent for marriage. In the second case the agent is restricted to a particular woman; and in the third, the restriction of his power to cancel is because he acted as a *fuzoolee* in contracting the marriage.

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not be valid; but if he should marry him to the sister of the woman, that would dissolve the first marriage; and if the agent should marry him, by one contract, to two women, one of whom is the sister of the first woman, or to four women by one contract, that would also dissolve the first marriage.

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CHAPTER VII.

OF DOWER.

Preliminary.

Definition and names of dower.

DOWER is defined to be 'the property which is incumbent on a husband, either by reason of its being named in the contract of marriage, or by virtue of the contract itself, as opposed to the usufruct of the wife's person;' and it is known by several names, as *muhr*, *sudak*, *nuhlah*, and *âkr*.[1] The dower which is due by the contract itself is termed the *muhr-i-misul*, which means literally, dower of the like, or the woman's equals,[2] and has been well rendered by Mr. Hamilton as 'the proper dower.' Dower is not the exchange or consideration given by the man to the woman for entering into the contract;[3] but an effect of the contract, imposed by the law on the husband as a token of respect for its subject, the woman.[4] For marriage in its original signification means conjunction, and requires only the union of the parties.[5] Hence it is valid though no dower were mentioned, and even though it were expressly stipulated that there should be no dower.[6] Dower being, as already mentioned, opposed to the usufruct of the woman's person, the right to either is not completed without the other. Hence on the one hand, dower is said to be confirmed and made binding on the husband by consummation, or by its substitute, a valid retirement, or by death, which by terminating the marriage, puts an end to all the contingencies to which it is exposed; and

[1] *Inayah*, vol. ii., p. 52.
[2] *Ibid.*
[3] *Kifayah*, vol. ii., p. 59.
[4] *Hidayah*, vol. ii., p. 58.
[5] *Kifayah, Ibid.*
[6] *Hidayah, Ibid.*

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on the other hand the woman becomes entitled to it as soon as she has surrendered her person.[1]

Exigible and deferred dower.

It is usual, however, to divide the dower into two parts—one termed *mooûjjul*, or prompt, which is immediately exigible: the other *moowujjul*, or deferred, which is not exigible till the dissolution of the marriage.[2] The payment even of the exigible part of the dower is not unfrequently postponed till that event. This is of little moment in Moohummudan countries. But in the British dominions in India, a right may be lost by neglecting to sue for it within the time that the law has fixed for the limitation of actions; and several cases have occurred in which widows have been deprived of their right to dower altogether by refraining to sue for it during the lives of their husbands.[3] These decisions have now been happily overruled by a judgment of her Majesty's Privy Council,[4] by which it has been determined that, though a woman's dower should be payable on demand, she is not obliged to sue for it immediately, nor in the lifetime of her husband. It may, therefore, be inferred that the time for the limitation of a suit for even the exigible part of a woman's dower does not begin to run until the dissolution of the marriage.

Section First.

Of the lowest amount of Dower.—What are, and what are not, fit subjects of Dower.—And of the proper Dower.

Minimum of dower.

The lowest amount of dower is ten *dirhems*, coined or uncoined; so that the weight of ten in pieces is lawful though their actual value should be less. When other property is substituted for *dirhems*, as, for instance, a piece of cloth, regard is to be had to its value at the time of the contract, according to the Zahir Rewayut. So that

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[1] *Inayah*, vol. ii., p. 55.

[2] *Reports S. D. A., Calcutta*, vol. i., p. 278; and see Lane's *Modern Egyptians*, vol. i., p. 215.

[3] *Reports S. D. A., Calcutta*, vol. i., p. 103; vol. vii., p. 40.

[4] Moore's *Indian Appeals*, vol. vi., p. 229.

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if its value were ten *dirhems* on the day of contract, but is less at the time of taking possession, the woman has no right to reject it; and in the contrary case, if its value were less at the former time, though equal to ten at the latter, she would be entitled to the difference. If the value be reduced by the loss of part of the property before taking possession, she has an option, and may take what remains of it, or ten *dirhems* instead.

No *maximum* of dower.

If more than ten *dirhems* be mentioned, the husband is liable:[1] so that there seems to be no legal limit to dower;[2] and dowers to very large amounts have been sustained by courts of justice in India.[3]

Property and profits are fit subjects of dower.

Anything that is *mal*,[4] or property, and has value,[5] is fit to be the subject of dower. *Moonafea*,[6] or profits, are also good for that purpose, with the exception of the man's own service when he is a freeman, which is not good as an assignment of dower; but the marriage is lawful at the proper dower, according to Aboo Huneefa and Aboo Yoosuf. The objection does not apply to the service of his male or female slave, nor to his own service if he is a slave; and the assignment would be good without any difference of opinion. But if a man should marry a woman on condition of teaching her the Korán, or instructing her in the rules of what is lawful and forbidden, or in the *hujj* (or pilgrimage to Mecca), or similar observances, the specification would not be valid, and she would be entitled to her proper dower.

Rule as to assignments of dower.

The general rule with regard to specifications of dower is, that when they are valid, the thing specified is obligatory on the parties; and nothing besides if it be the value

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[1] *Doorr-ool-Mookhtar*, p. 203.

[2] *Reports S. D. A., Calcutta*, vol. i., p. 277.

[3] *Ibid*, vol. i., pp. 48 and 260, where the dowers were respectively 300,000 gold mohurs, and 114,000 rupees with 355 gold mohurs.

[4] Everything corporeal, except carrion and blood, is *mal*.

[5] Everything that is *mal*, except wine and the hog, has value.

[6] Profits are of two kinds, according as they are derived from the use of corporeal things, such as houses, land, and cattle; or the labour of artisans, such as tailors, &c. *Inayah*, vol. iv., p. 43.

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of ten *dirhems* or more; while, if it be less than ten *dirhems*, the dower must be made up to that amount.

Miscellaneous cases.

When a man marries a woman on a condition that he will not take her away from her own town, or will not marry another while she is his wife, the specification is not valid, because there is no *mal*, or property. And in like manner, when a *Mooslim* marries a *Mooslimah* for wine or a hog, the assignment is not valid, because the things have no value in law. But if he should marry her for the profits of all his property, such as the occupation of his house, the use of his cattle for riding or carriage, or the like, for a definite period, the assignment would be valid. Where again a woman marries a man for repudiating another woman, or releasing herself from the quest of blood, or performing the *hujj* (or pilgrimage to Mecca) with her, or postponing a debt for a thousand *dirhems* which she owes to him, the assignment is bad, and the woman is entitled to her proper dower.

Of *Shighar*, or a reciprocal bargain as to dower between two parties.

When one man gives his daughter or sister in marriage to another, on condition that the other will give him his daughter or sister in return, the right to the person of each woman being the dower of the other, the contracts are effected, but the condition is void, and each woman is entitled to her own proper dower. This is what is termed a *Shighar* marriage.[1]

What is not a fit subject of dower.

When something is mentioned as dower which is not in existence at the time, as, for instance, the future produce of certain trees, or of certain land, or the gains of a slave, the assignment is bad, and the woman is entitled to her proper dower. So also when something is mentioned which is not at the time property in all respects, as, for instance, what may be in the wombs of his flocks, or of his female slave, at the time, the assignment is not valid, and the wife is entitled to her proper dower.

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[1] *Jowhurrah*; *Inayah*, ii., p. 63. From *Shughoor*, lifting up and denuding, applied primarily to the action of a dog in lifting up one of his legs to make water (*Kifayah*, ii., p. 69); and thence—probably in contempt—to this kind of marriage, which was common among the Pagan Arabs, but prohibited by the Prophet.

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If a man should marry a woman for a dower to be fixed by herself, or by him, or a stranger, the assignment would be defective. But if, when the dower is left at his own discretion, he should fix it at the proper dower or something more, she would be entitled to the sum fixed; while, if he should fix it at anything below the proper dower, she would be entitled to the proper dower, unless satisfied to take the sum specified. Where, again, the dower is left at the discretion of the woman, and she fixes it at the proper dower or something less, she is entitled to the dower she has fixed; while if it is more than the proper dower, the excess is not lawful, unless assented to by the husband. And the rule is the same when the dower is left at the discretion of a stranger. If he fixes it at the proper dower, it is obligatory on both the parties; while if he fixes it above or below the proper dower, it is dependent, in the former case on the assent of the husband, and in the latter on that of the wife.

When the dower is left to be fixed by one of the parties, or a stranger.

The proper dower of a woman is to be determined with reference to the family of her father, when on a footing of equality with her in respect of age, beauty, city, period, understanding, religion, and virginity. It is also a condition that the parties compared shall be equal in knowledge and manners, and that neither of them should have borne a child. It is likewise said that the condition of the husband in respect of wealth and lineage should be like that of the husbands of the women with whom she is compared. By her father's family are to be understood her full sisters, her half-sisters by the father, her paternal aunts, and the daughters of her paternal uncles. And in estimating her proper dower, no regard is to be paid to the dower of her own mother, unless she happened to be of her father's family, as, for instance, by being the daughter of his paternal uncle. It is also made a condition in the Moontuka that the informants of the proper dower be two men, or one man and two women, and that their information be given in words of testimony; but if no just witnesses can be found to speak to the matter, the word of the husband on his oath is to be received. If a

How the proper dower is to be determined.

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woman should contract herself in marriage at the dower of her mother, that would be lawful according to one authority, and according to another this is correct.[1]

Section Second.

How Dower is confirmed or perfected.[2]

How the wife's right to dower is perfected.

Dower is confirmed by one of three things, — consummation, a valid retirement, and the death of either husband or wife; and that, whether the dower be named, or be the proper dower. So that no part of it can fail after this, except by the discharge of the party entitled to it.

If repudiated before it is perfected, she is entitled to half the specified dower;

or a *mootaut*, or present, if none has been specified.

When a man has repudiated his wife before consummation or a valid retirement, she is entitled to half the specified dower; and when none has been named in the contract, or he has married her with a condition that she shall have no dower, she is entitled to her proper dower if the marriage be consummated or the husband should happen to die, and to a *mootaut*, or present, if repudiation takes place before consummation or a valid retirement.[3] When dower has been assigned by the judge, or by the husband after the contract, and the husband repudiates his wife before consummation, she is entitled only to a *mootaut*, instead of half the specified dower, according to Aboo Huneefa and Moohummud. So, also, when no dower has been specified in the contract, but the parties afterwards arrange it by mutual agreement, though she has a right to the whole if the marriage be consummated, or her husband happens to die; yet, if she be repudiated before consummation, it is only a *mootaut*, or present, that she is entitled to, and not half of the dower subsequently agreed upon.[4]

And sepa-

It is only when a husband is himself the cause of the

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[1] *Fut. Al.*, vol. ii., p. 432.

[2] The word in the original means literally 'corroborated,' or 'made binding.' As to the full legal meaning, see *ante*, p. 91.

[3] *Hedaya*, p. 125.

[4] *Ibid.*, vol. i., p. 124. The authority of the Korán is cited for this.

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separation that he is liable for a *mootaut*, or present; as, for instance, when he repudiates his wife, or is separated from her by reason of *eela*, or *lián*, or *jubb*, or impotence, or for apostasy and rejection of *Islam*, or kissing his wife's mother or sister with desire. And he is not liable when the cause of separation is on the part of the wife; as for instance, when it is her apostasy and rejection of *Islam*, or when she kisses her husband's son with desire, or exercises an option of puberty, emancipation, or inequality. In every case in which there is no liability for *mootaut*, or present, there is none for half the dower, if dower were specified; and in every case in which a contract requires the proper dower, a *mootaut* is due if the wife is repudiated before consummation.

ration from her husband for any other reason originating on his part has the same effect.

A *mootaut*, or present, consists of three articles of dress —a *kumees*, or shift; a *moolhuffet*, or outer garment; and a *mikna*, or head-dress, of medium quality, neither very good nor very bad. This is according to their practice, but in ours regard is had to our own usage.[1] And if the husband should give her the value of the articles in *dirhems* or *deenars*, she may be compelled to accept it. But it is not to exceed half the *muhr-i-misul*, or dower of her equals, nor fall short of five *dirhems*. Regard is also to be had to the woman's condition, for the present comes into the place of the proper dower. If, then, she be of low degree, she is to have a *mootât*, or present, of *kirbas*, or linen; if of middle rank, one of *kuzz*, or spun silk; and if of high station, one of *abreshom*, or silk. But regard should be had to the man's condition, according to the Hidayah and Kafee; while, according to other authorities, the conditions of both should be taken into consideration; and the *Futwa* is said to be in accordance with this view.

Mootaut described.

There is no *mootaut* for a woman whose husband has died leaving her surviving him, whether dower were assigned to her or not, and whether the marriage had

Cases in which there is no right to it.

[1] By 'their,' I suppose, is meant the practice in Arabia, and by 'our' the custom in Hindostan.

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or had not been consummated.[1] And in like manner, in any case of invalid marriage, when a judge separates the parties before consummation or a valid retirement, or even after a valid retirement, when the husband denies consummation, there is no *mootaut*. And with respect to liability for *mootaut*, a slave is in the same predicament as a freeman, when his marriage has been with consent of his master.

Different kinds of *mootât*.

There are three kinds of *mootaut*:—1st. Incumbent, which is due to every woman repudiated before consummation, for whom no dower has been assigned; 2nd. Laudable, which is conferred on any woman repudiated after consummation; and 3rd. What is neither incumbent nor laudable, which is applicable to women repudiated before consummation to whom dower has been regularly assigned. So that it is laudable to confer a *mootaut*, or present, on all repudiated women except the last; namely, those for whom dower has been assigned, and who are repudiated before consummation.[2]

Valid retirement.

Retirement is valid or complete when the parties meet together in a place where there is nothing in decency, law, or health, to prevent their matrimonial intercourse. And the retirement is invalid whenever there cannot be such intercourse; as, for instance, when one of the parties is affected by a chronic disease; and the sickness of the man and the woman are alike in this respect. It is implied that the sickness is one that prevents coition, or would render it injurious; and any sickness on the man's part, accompanied by debility or languor, would be considered preventive, whether it should render coition actually injurious or not; and this distinction is also true with respect to diseases of the woman. When a man and his wife retire together, and either of them is a *moohrim* on account of the ordained pilgrimage, or is observing the ordained fast, or is engaged in the exercise of the ordained prayers, the retirement is not valid; but when the fast

What it requires as to the condition of the parties.

[1] Because, in the event of death, she is entitled to full dower, either that specified or the proper.

[2] *Hidayah*, vol. ii., p. 67.

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is only to make up for previous omissions, or for the performance of a vow, or expiation, it does not prevent a retirement from being valid, according to the more correct opinion; and neither voluntary fasts, nor voluntary prayers, have that effect, according to the Zahir Rewayut. If the retirement should take place during the monthly courses, or a *nifas* (or period of purification after child-birth), it would not be valid. The retirement of a boy unfit for coition is not valid, nor that of a girl in like circumstances. When an infidel retires with his wife after he has embraced the faith, the retirement is valid; but not so, if the wife be an idolatress. And if there be any one present with the parties who is asleep or blind, that prevents the validity of the retirement; but the presence of a little child who does not understand, or of a person who has fainted away, does not. If, however, the child has understanding enough to mark what is going on between them, or a deaf or dumb person be present, the retirement is not valid. An insane person or lunatic is like a little child; if he has sufficient understanding, the retirement is not valid, otherwise it is. Though there are some differences of opinion as to the presence of a handmaid of the wife, yet, according to the *futwa*, it renders the retirement invalid. But the presence of a handmaid of the husband has not that effect. The presence of another wife of the husband breaks the retirement; and the presence of a biting dog has also that effect; and though the dog should not be vicious or biting, yet if it belong to the wife, the effect is the same; but not so if it be the property of the husband.

As to the absence of others.

If a woman should enter a room where her husband is asleep and alone, the retirement is valid, whether he is aware of her entrance or not. This answer is probably based on the saying of Aboo Huneefa; according to whom, the same rule is applicable to a sleeping person as to one awake. If a woman should enter the room where her husband is alone, without his knowing her, and, after remaining some time there, should retire, or if a husband should enter the room where his wife lies, without knowing her, there is no retirement until he recognizes her. And

As to the place.

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the husband is to be believed when asserting his ignorance. If he know her, the retirement is valid, though she should not know him.

Other causes that may render a retirement invalid.

Among the causes which render a retirement invalid are any natural obstruction or rupture on the part of the woman. And if a man compare his wife to the back of his mother, and then retire with her before making expiation, the retirement is not valid, intercourse with her in such circumstances being prohibited. And if a husband should retire with his wife, and she should refuse to surrender herself to him, the moderns differ as to the effect, some being of opinion that the retirement is invalid, while others maintain its validity. The retirement of a *mujboob* eunuch is valid, according to Aboo Huneefa; and the retirement of an impotent person, or an ordinary eunuch, is also valid.

The place must be secure from observation.

To make a retirement valid, the place must be one where the parties are secure from observation without their own permission—as a mansion, house, or separate apartment. An open plain where no one is near does not constitute a valid retirement, as the parties are not secure from passers-by. So, also, if the parties should retire to the top of a house, on the sides of which there is no screen or parapet, or only one pervious to sight, or so low that a standing person can look over it, the retirement would not be valid if there be any fear of intrusion; but if secure from that, the retirement would be so. In a garden without a door that is locked, there is no retirement; but if the door be locked, the retirement is valid. A litter, with a covering which remains fixed by day and night, if large enough, may make a valid retirement; or an uncovered apartment, or vineyard, according to the Zahir Rewayut, provided that the vineyard be enclosed by walls. It is stated in the Mujmooa Nuwazil that a question was put to the Sheikh ool Islam,—regarding a man who married a wife, and her mother, having brought her to him, went out, pushing the door to, but not locking it, the apartment being in an inn, where many persons were residing, and the apartments having open casements, and people sitting in the open area of the inn, looking from a distance,—

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whether that was a valid retirement, and he answered that if the persons were looking into the casements, steadily observing them, and the parties were aware of the fact, the retirement would not be valid; but seeing from a distance, and people sitting in the area, do not prevent the validity of the retirement, for the parties may retire into a corner of the apartment where they cannot be seen.

Retirement equivalent to consummation in some respects.

Retirement imposes on a repudiated woman the necessity of observing an *iddut*, whether the retirement be valid or invalid, on a liberal construction of the law, from an apprehension that she may have conceived. And Koodooree has observed that mere legal impediments to the validity of a retirement do not prevent it from having this effect; but if the impediments are real, such as sickness or infancy, an *iddut* is not required. 'Our' masters have placed a valid retirement on the same footing as coition in some of its effects, but not in others. They have done so in the confirmation of dower, and the establishment of descent or paternity, the observance of *iddut*, and the wife's right to maintenance and a residence during its continuance, the unlawfulness of marriage with the wife's sister, or with other four women besides her, or with a female slave according to the analogy of Aboo Huneefa's opinion, and *mura'aut*, or the observance of the time for repudiation in respect of her. But they have not placed it on the same footing as coition in making a person *moohsin* or a daughter unlawful, or a divorced woman lawful to her first husband, or for the purpose of revoking repudiation, or for inheritance. And retirement does not come into the place of coition in impairing virginity; so that if a man should retire with a virgin, and then repudiate her, she would subsequently marry as a virgin.

Dower once perfected does not abate,

When dower has once been perfected, it does not drop, though a separation should afterwards take place for a cause proceeding from the wife, as, for instance, by her apostatizing or consenting to the son of her husband after he had consummated or retired with her; but before dower is perfected, the whole falls by reason of any sepa-

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even by the death of either party before consummation.

ration proceeding from the wife. If either of the parties should die a natural death before consummation of a marriage in which dower has been assigned, the right to it is perfected, without any difference of opinion, whether the woman be free or a slave. So, also when one of the parties has been slain, whether by a stranger or by the other of them; and in the case of the husband, though by his own act. When the wife commits suicide, there is no abatement to the husband from the dower, if she were free; nay, he is liable for the whole. But if she were a slave, Husn reports as the opinion of Aboo Huneefa that the dower would drop. There is, however, another report, by which he is said to have agreed with his disciples, who were of opinion that it would not. If she be slain by her master before consummation, the dower drops, according to Aboo Huneefa, but not so according to the disciples. This difference of opinion is only when the master is adult and sane; for if he were a minor or insane, they were all agreed that the dower would not drop. When one of the parties to a marriage in which there was no mention of dower has died, the right to the full *muhr-i-misul*, or proper dower, is perfected, whether the woman be free or a slave, without any difference of opinion.

Section Third.

When the specified Dower is Property, and something is added to it that is not Property.

When the dower consists partly of what is, and partly of what is not, property.

When the dower consists partly of property and partly of what is not property, as, for instance, when a man has married a woman for a thousand *dirhems* and the repudiation of a certain other woman, the repudiation takes effect simultaneously with the contract, and the wife has merely the sum specified. It is different when he has married her for a thousand and on condition that he will repudiate a certain other woman; for then the repudiation does not take effect till it is actually pronounced; and if after entering into such a stipulation he should fail to repudiate

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the person referred to, the wife would be entitled to her full proper dower; in the same way as if, after marrying her for a thousand and an engagement to make her a present, he should fail to perform the engagement. And the rule is the same with regard to every other condition involving a farther benefit to the wife, when the condition is not fulfilled. When it is said that the wife is entitled to her proper dower, it is implied, of course, that this exceeds the amount specified in the contract; for if that should be equal to or in excess of the proper dower, she would be entitled to the specified dower in the event of the non-fulfilment of the condition. And if the advantage stipulated for be in favour of a third party, and the condition is not complied with, the wife has no choice, and is entitled to no more than the dower specified in the contract.

When it consists of things lawful and unlawful.

If a *Mooslim* should marry a *Mooslimah*, and specify for her in the contract some things that are lawful with some that are unlawful, as, for instance, if, in addition to a valid dower, he should mention some *rutls* of wine, the former only would be the dower, while the latter would be thrown entirely out of account, as having no legal value for *Mooslims*, and the woman would have no claim to a full proper dower.

Section Fourth.

Of Conditions in the Dower.

When it is involved in a condition of something to be given or done by the wife.

If a man should marry a woman on a dower of a thousand, and make it a condition with her that she is to give him a particular garment, the thousand must be divided in the ratio of the value of the garment to the proper dower, and the sum corresponding to the value of the garment is to be considered as its price, while the sum corresponding to the proper dower is the value of the woman's person. It is stated in the Moontuka, that when a man has said to a woman, 'I will marry you on a dower

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of a thousand *dirhems*, on condition that you will marry such a woman to me on a dower to be paid her by you, and he has married the woman accordingly on that condition, the dower is her share of the thousand when divided in proportion to her own proper dower and the proper dower of the woman referred to, and she is under no obligation to contract the woman to him. But if he should say, 'I will marry you on a dower of a thousand *dirhems*, on condition of your marrying such an one to me for a thousand,' and she should accept the terms, and the marriage should take place accordingly, the woman would be married without any specified dower, and would accordingly be entitled to the proper dower of women of her family.

When the condition is on the part of the husband for an increased dower in certain contingencies.

If a man should marry a woman on a dower of a thousand, in the event of his not having a wife already, and two thousand if he have; or on a dower of one thousand if he shall not remove her from her own city, and two thousand if he shall; or a dower of one thousand if she be a *Mowallee*, and two thousand if she be an Arab, or the like; there is no doubt that the marriage is lawful, and with regard to the dower, that the first part of the conditions is also lawful, without any difference of opinion; so that if the fact be, or the husband should act, as mentioned in that alternative, the woman would be entitled to the corresponding dower. But if the fact be, or the husband should act, as mentioned in the second part of the condition, then the woman would have the proper dower, provided that it do not fall short of the smaller nor exceed the greater of the sums mentioned. This is according to Aboo Huneefa, but in the opinion of Aboo Yoosuf and Moohummud both parts of the condition are lawful. And if a man should marry on a dower of two thousand in the event of the woman being beautiful, and one thousand if she be ugly, the marriage would be valid, and both parts of the condition lawful, without any difference of opinion. So, also, if he should marry her, on a condition of giving her more than the proper dower if she be a virgin, and she should prove to be *suyyib*, he would not be liable for

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anything over the proper dower. A man marries a woman on condition of her being a virgin, and consummates with her, but finds her to be otherwise, the full dower is due; and if he should marry her on a dower of a thousand *dirhems* to be paid now, or two thousand at a year, then, according to Aboo Huneefa, the woman would have her choice of the alternatives if the proper dower were two thousand *dirhems* or more; and if it were less than one thousand the choice would be with the man to give her whichever of the two sums he might please; while if the proper dower were more than one thousand *dirhems* and less than two thousand, she would have the proper dower, according to Aboo Huneefa. And if he should divorce her before consummation, he would be liable for half the less of the two sums, according to all opinions.

When the condition is also on his part, but for some benefit to a third party.

If a man should marry a woman on a condition that he is to give her father a thousand *dirhems*, this thousand would not be a dower, neither could he be compelled to make delivery, but the woman would be entitled to the proper dower; and if he should make delivery of the thousand, it would be a gift, which, being the donor, he might recall at pleasure.[1] But if he should say 'on condition that I am to give him a thousand *dirhems* as from you,' the thousand would be a dower, and if the woman were repudiated before consummation, but after delivery of the thousand, she would be entitled to have recourse against her husband for half the sum mentioned, while the other half would be a gift, which she being the donor of it would have the right to recall. Ibn Samaut has reported, as from Moohummud, that when a man has married a woman on a dower of two thousand, one thousand for herself and a thousand for her father, or when she has said, 'I have married myself to you for two thousand, one thousand to myself and one thousand to my father,' this is lawful, and both thousands are the woman's.

When the dower is in the form of

If a man should say to a woman, 'I will marry you on condition that I am to give you a thousand *dirhems*,' or

[1] Gifts to a stranger may, in general, be revoked at any time.

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an executory condition.

'that I am to give you my slave,' and the marriage should take place accordingly, then, according to Aboo Yoosuf, if delivery be made of the sum mentioned, it becomes the dower, but if the husband refuse to make delivery he cannot be compelled, and the wife is entitled to the proper dower, not however exceeding the thousand, nor the value of the slave; and this, it appears, was also the opinion of Aboo Huneefa.

When a condition is made by guardians in their own favour.

In the Nuwadir it is reported as from Moohummud that when the guardians of a woman have said to a man who wishes to marry her, 'We have married her to you at a thousand *dirhems* on condition that a hundred out of them is to be your own,' this is lawful, and the dower is the remaining nine hundred; but if the terms were, 'We have married her to you at a thousand *dirhems*, on condition that we are to have fifty *deenars*,' both *dirhems* and *deenars* would belong to the woman.

Section Fifth.

Of Dowers in which there is something unknown.

When the dower is unknown as to species and quality. When unknown as to quality only.

There are three kinds of named or stipulated dowers. In one the species and quality are both unknown, as if a person should marry a woman for 'cloth,' or 'a beast,' or 'a mansion;' and in cases of this description she is entitled to her proper dower. In another, the species is known but its quality unknown, as if the marriage were for cloth of Herat, or a slave, a horse, a cow, or a sheep; and in such a case, the husband is liable for one of medium value, which may be given either in kind or in value.[1] That is, when the cloth or slave is mentioned absolutely, without any reference of it to the party himself; but if he should mention them with a reference to himself, by saying, 'I have married thee for *my* slave,' or

[1] A sale, in such circumstances, would be invalid for uncertainty. *M. L. S.*, p. 185.

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'*my* cloth,' he would not be at liberty to give the value, the reference to himself being a means of definition, like actual pointing it out.[1] The value is to be taken at a medium between high and low prices, according to Aboo Huneefa and Moohummud; and the *futwa* is in accordance with their opinion. If the parties choose to compound for less than the medium value the composition would be lawful, but not so if it were for more. In the third kind of specified dower both species and quality are known; as if one should marry a woman for something estimable by weight or measure of capacity, and described as to its quality,[2] but left on his responsibility, that is, undelivered; and in such a case the specification would be valid and delivery incumbent on the husband. If it were for a *koor* of wheat absolutely, that is, without any description as to quality, he would be at liberty to give a *koor* of *medium* quality or its value; the case then falling under the second description of named or specified dowers. All other commodities estimable by weight or capacity follow the same rule as wheat.

When both species and quality are known.

If a man should marry a woman for this slave *or* this thousand, or for this slave *or* that slave, and one is inferior in value to the other, the proper dower is to be taken as the standard, and if that be equal to or more than the value of the superior, the woman should have the superior for her dower, on the ground of her own assent to that as the *maximum*; while if the proper dower were only equal to or less than the inferior, she would have *that* for her dower, on the ground of her husband's assent to it as the *minimum*; and if the proper dower should fall between the two values, she would have it for her dower. This is according to the opinion of Aboo Huneefa; but in the opinion of the two disciples, the inferior would be the dower in all the cases. And there would be the like difference between the authorities if the marriage were for

When the dower is alternative.

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[1] It would be insufficient in sale if the seller had more than one. *M. L. S.*, p. 185.

[2] That is, as good, bad, or medium.

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one thousand *or* two thousand. But if the woman were repudiated before consummation, she would be entitled to no more than half the inferior, according to all the opinions; unless it fell short of the *mootaut* or present, in which case she might take the latter.

When it is of a house indefinitely;

If a man should marry a woman for a *beit*, or house, though, among the Arabs, if he were a *Budwee*, or inhabitant of the desert, it would be taken to signify one of hair (a tent), and if he were a townsman, or inhabitant of a town, one of medium value, yet, with 'us,' a *beit*, taken indefinitely, is not a fit subject for dower, and the man would be liable for the proper dower in the same way as he is liable for the proper dower when the contract is for a *dar*, or mansion, without defining it. But if the house were distinctly specified as a particular house, the assignment of it, as dower, would be quite valid. When a man has married a woman for 'his share in this *dar*,' she has an option, according to Aboo Huneefa,[1] and may either take the share, or her proper dower up to the value of the whole *dar*, but no more, though it should be in excess of the value; and, according to his companions, she has only the share, if equal to ten *dirhems*. And the rule is substantially the same, with a like difference of opinion, when the marriage is for 'whatever he may have of right in this *dar*,' except that in such a case Aboo Huneefa would apparently have given her the proper dower without any option if it amount to ten *dirhems*.

when it is in money, and there is a doubt as to the coin or currency.

If one should marry a woman for 'a thousand' absolutely, a thousand in gold or silver (that is, *dirhems* or *deenars*) would be inferred, according as the one or the other would be nearer to the proper dower. And when *dirhems* have been mentioned, and there are several descriptions current in the city, that which is most prevalent is to be inferred; and if there is none more prevalent than another, then that

[1] The gift of an undivided share is invalid; and though the sale of it is lawful, it is necessary that the purchaser should know the share. *M. L. S.*, p. 183.

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which is most in accordance with the proper dower; and when all *dirhems* have ceased to be current by reason of the substitution of another coin, their value at the last day of their currency is to be assumed. A mere change in value in consequence of there being more or less of them in circulation is not to be regarded, provided they were current at the time of the contract, and even though not then current they are still obligatory, if equal to ten *dirhems*.

Case of two women married for one dower.

When a man has married two women on one dower of a thousand, it is divided rateably among them in proportion to their proper dowers. And if both are repudiated before consummation, half of one thousand is to be divided between them in the same ratio. If only one of the women should accept the contract, the marriage would be lawful as to her, and the thousand be divisible in the same manner, so much of it as corresponds to her proper dower being the specified dower for her, and the share of the other reverting to the husband. But if the marriage should prove invalid as to one of them, the whole of the thousand would belong to the other, and if consummation should take place with her whose marriage is invalid, she would be entitled to her proper dower, according to Aboo Huneefa; and this is correct.

If a man should marry a woman for one of his slaves, or shirts, or turbans, the assignment would be valid, and he would be liable for one of them of medium value.

Section Sixth.

Of a Dower that proves to be different from what was named in the Contract.

When it proves to be unlawful.

When a *Mooslim* has married a woman for *this* cask of vinegar, and it proves to be wine, she is entitled to her proper dower, according to Aboo Huneefa; and if the marriage be for *this* slave, and he proves to be free, the husband is, in like manner, liable for the proper dower.

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But if the cases were reversed, and the marriage were for *this* cask of wine, and it should prove to be vinegar, or *this* free man, and he turns out to be a slave, the woman would be entitled to the actual thing specified, according to the most authentic report of Aboo Huneefa's opinion, with which Aboo Yoosuf concurred. When a man has married a woman for a particular male slave, and the slave proves to be a female, or a particular piece of Meroo cloth, which proves to be cloth of Herat, he is liable for a male slave equal in value to the female, and a piece of Meroo cloth of the value of that of Herat. So also if he should marry her for a particular slave, and he should prove to be a *moodubbur* or a *mookatub*, or, being a female, she should prove to be an *oom-i-wulud*, in all these cases he would be liable for the value, without any difference of opinion, whether the woman were aware of the condition of the slave or not. And if he should marry her for *these* two slaves, and one of them is free, or *these* two casks of vinegar, and one of them is wine, she is entitled to the remaining slave or cask only, according to Aboo Huneefa. It is stated in the Moontuka, as on the authority of Moohummud, that when a man has married a woman for land, which he has described by its boundaries, on condition that it contains ten *jureebs*, and the woman, on taking possession, finds that there are only six *jureebs*, and this happens before she has sown the land, she has an option, and may take the land as it is without anything besides, or she may reject the land and take its value, as if it were ten *jureebs* in the same *mouzah* or village. But if she had already sold the land, or made a gift of it with delivery, and then became aware that it contained only six *jureebs*, she would be entitled to nothing but the land. And in like manner with regard to pearls when they fall short of weight, and cloths when short of measure. If, however, she had neither sown nor given away the land, but it had been overflowed by the Tigris or other river, and had been destroyed or become waste in consequence, and she had then ascertained that there were but six *jureebs*, she might have recourse to her husband for the

When it is different in kind from what was described.

When the variance is in quantity,

and it is discovered before a change in the subject, or after such change.

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full value of the land. And when a man marries a woman for land, under a condition that there are a thousand date-trees in it, and describes its boundaries, or for a mansion also defined by its boundaries, under a condition that it is built with bricks and mortar and timber, and behold as to the land there are no trees in it, and as to the mansion it has no buildings,—she has an option, and may take the land or mansion as they are, with nothing more, or she may take her proper dower. And if he should repudiate her before consummation, she is not entitled to anything but half the land or half the mansion, as she has found them, unless her *mootaut* or present be more than this, in which case she has an option and may take half the land or half the mansion without anything else, or she may take the *mootaut*.

When the variance is in the appurtenances.

Section Seventh.

Of Additions to and Abatements from the Dower: and of what is increased or diminished.

An addition to the dower is valid during the subsistence of the marriage, according to our three masters. And if a man should make an addition to his wife's dower after the contract, the addition is binding on him, that is, when the woman has accepted the addition; and it makes no difference whether the addition be of the same kind as the original dower or not; or whether it may be made by the husband or by his guardian. The addition is not a gift, as supposed by Zoofr, requiring possession to render it complete,[1] but an alteration of the terms of the contract in a non-essential matter within the power of the parties, and, like an addition to the price in sale, becomes incorporated with the original dower.[2] It nevertheless falls to the

An addition may be made to the dower at any time during the subsistence of the marriage,

and it becomes incorporated with the original.

[1] If it were a gift it would not only require possession, but delivery of it could not be compelled; and this was *Zoofr's* opinion with regard to additions to dower. (*Inayah*, vol. ii., p. 38.)

[2] *Inayah*, vol. ii., p. 58, and *Hedaya*, vol. i., p. 127, and vol. ii., p. 485.

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ground when the woman is repudiated before consummation.[1] Thus, an addition to the dower is perfected in the same way as the original, that is, by one of three causes, viz., consummation, valid retirement, or the death of one of the married parties; but if a separation of the parties should take place without the occurrence of one or other of these three causes, the addition is void, and it is only the original dower that is halved, according to Aboo Huneefa and Moohummud.

But an addition cannot be made to the dower after a complete separation of the parties.

In the Futawa of Aboo Leeth it is stated that an addition to a dower after a gift of it[2] is valid, but if made after a separation has taken place between the parties it is void, according to Khwahir Zadah; and Busher has reported to the same effect, as on the authority of Aboo Yoosuf, that when a person repudiates his wife three times (it matters not whether before or after consummation), and then makes an addition to her dower, the addition is not valid. In like manner, if, after the expiration of the *iddut* of a woman repudiated revocably, an addition were made to her dower, the addition would not be valid, because the separation or divorce would then be complete. But if before the expiration of her *iddut* the husband of a woman repudiated revocably should say to her, 'I have recalled thee on a dower of a thousand *dirhems*,' it would be lawful if she should accept, but not otherwise; for in such circumstances the thousand would be an addition to the dower, and such an addition is suspended on acceptance. But is it a condition that the acceptance should be declared at the same meeting? According to the most authentic opinion, it is so.[3]

Abatement from the dower is valid.

If a woman should allow an abatement from her dower the abatement is valid. Her consent is necessary to the validity of an abatement; for if made against her will it is not valid. It is also necessary that she should not be sick of her death illness at the time of giving her assent.

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[1] *Hedaya*, vol. i., p. 127.

[2] That is, after the woman has given it away.

[3] This is agreeable to the analogy of additions to the price in sale. See *M. L. S.*, p. 241.

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When a man has married a woman for a male or female slave, or something else that is specific, and an increase takes place in the subject of the dower, and the woman is then repudiated before consummation—in such circumstances, if the increase is before possession, and be united to and have issued from the original (as an increase of fatness, stature, goodness, or beauty); or if the increase be separated from and have issued from the original (as a child when it is born, or wool or hair when they are cut off), then the original subject of the dower and the increase are both to be halved. And though the woman should have taken possession of the original, with the increase issuing from it, and is then repudiated before consummation, both the original and the increase are still to be halved. Where, again, the increase is united to the original, but has not issued from it (as when a piece of cloth is dyed, or buildings are erected within a mansion), and the woman has become seized of the whole, it is not to be halved, and she is liable for half the value as of the day when she took possession; while if it be separated from, and has not issued out of, the original (as when a gift is made to a slave, or something is acquired by him), then, according to Aboo Huneefa, the original only is to be halved, and the whole increase becomes the wife's; but, according to the disciples, the original and increase are both to be halved. If the increase should take place after possession, and be united to and have issued from the original, it prevents the halving, and the husband has a claim against her for half the value as of the day of delivery, according to Aboo Huneefa and Aboo Yoosuf, though, according to Moohummud, it does not prevent the halving; while, if the increase be united to without having issued from the original, it does prevent the halving, and she must deliver half the value of the original. When, again, it is separated from and has not issued from the original, it prevents the halving, according to them all; but if it be separated from without having issued from the original, the increase belongs to the woman, and the original is to be halved.

Effect of repudiation before consummation when an increase in a specific dower takes place, and before possession.

When the increase takes place after possession.

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Effect of repudiation before consummation — when the increase takes place after it.

All this when the increase has first taken place, and the repudiation before consummation then follows. But suppose that the repudiation is first in point of time, and that an increase then appears: this may occur either after decree has passed in favour of the husband for a half, or before it, and either before possession or after it; but if it occur before possession the original and increase belong to the parties in halves, whether there has been a decree or not; and if it comes after possession, and after decree for a half to the husband, the answer is the same; while if it occur before the decree for half to the husband, the dower in her hands is like a thing possessed by virtue of an invalid contract.[1] And if a woman should apostatize, or kiss her husband's son before consummation, but after the occurrence of an increase, the whole of the increase would be hers, and she would be liable for the value of the original as of the day that she took possession.

When the subject of the dower is damaged in the husband's hands, and the damage accidental.

When the subject of the dower sustains damage in the hands of the husband, and he then repudiates his wife before consummation, the case presents several aspects. First—when the damage is accidental.[2] Here, if it be slight, she is entitled to no more than half the blemished slave, and has no claim on her husband for the damage; but if it be serious, she has an option, and may take half the blemished slave, without any claim on her husband for the damage, or may abandon the dower to her husband, and claim half its value as on the day of contract. Second—when the damage has been occasioned by the act of the husband. Here, if it be slight, she may take half the slave, and hold her husband responsible for half the damage, but she cannot abandon the slave to her husband, and make him responsible for half the original value. While if the damage be serious, she may do so, or, if she please, take half the value of the slave as he stands, making the husband liable for half the damage. Third—when the damage is occasioned by her own act; and here, she has only half the slave, without any option, whether the damage be

When it is by the act of the husband.

When by the act of the wife.

[1] See *M. L. S.*, p. 213.

[2] Literally, by a heavenly calamity.

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slight or serious. Fourth—when the damage is occasioned by the act of the subject of the dower; and in this case the results are the same, according to the Zahir Rewayut, as if the damage were accidental. Fifth—when the damage is occasioned by the act of a stranger; here, if the damage be slight, she can only take half the slave, and proceed against the stranger for half the damage, and has nothing besides; and if it be serious, the same course is open to her, or she may throw back the slave on her husband, and take from him half the value of the slave on the day of the contract; whereupon the husband may have recourse against the stranger (transgressor) for the whole damage. In all these cases the loss is supposed to take place in the hands of the husband. But now suppose that it occurs in the hands of the wife, and that he then repudiates her before consummation. Here, if the damage be accidental and slight, the husband can only take half the damaged dower, with nothing besides; and if it be serious, he may take the half, damaged as it is, without any claim against her for the damage; or he may abandon it entirely, and hold her answerable for half the value in the same state of soundness as on the day of taking possession. But if the damage in the hands of the woman occur after repudiation, all the learned are agreed that the husband may take the half with compensation for half the damage. So Koodooree has reported in his Commentary, and it is valid. And if the damage be by the act of the wife, then whether it be before or after the repudiation, the case is the same as if it were by accident; and so likewise when it is by the act of the subject of the dower. When the damage is the act of a stranger, and it occurs before repudiation, the husband's right is cut off from the dower itself, but the wife is responsible to him for half the value on the day that she took possession; for the stranger being liable for compensation, this becomes a separated increase, which, as already stated, precludes a division of the actual dower. And if the loss occurs after repudiation, the effect is the same as when it occurs before it, according to a report by the Hakim Shuheed; but, according to Koodooree's Com-

When by the act of the subject of the dower.

When by the act of a stranger.

When the damage occurs in the hands of the wife before repudiation.

Effect when it occurs after repudiation.

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mentary, the husband takes half the original, and has an option of recourse against the wife, or the stranger, for half the compensation. If the damage be before repudiation, and by act of the husband, the case is the same as when it is by the act of a stranger.

When there is an entire loss of the dower in the hands of the husband; in the hands of the wife.

If the *sudák*, or dower, should perish utterly in the hands of the husband, and he should then repudiate the woman before consummation, she would be entitled as against him to half its value on the day of contract; while, if it perish in the hands of the wife, and he then repudiates her before consummation, he is entitled as against her to half its value on the day of contract.

No option of inspection in dower and none of defect unless it be glaring.

A woman has no option of inspection with regard to dower;[1] and cannot return the subject of it for a defect, except it be very glaring, unless when the dower happens to consist of articles that are estimated by weight or measure of capacity; but in that case the articles may be returned for a small defect. And if a man should marry a woman for a particular female slave, and the slave should die in the woman's possession, after which it is discovered that the slave was blind, the wife may have recourse to her husband on account of this defect, as in a case of sale. And if the slave were not particularized, the wife may claim from the husband her value, blind as she was, and the husband claim from the wife the value of a medium slave; whereupon, one value being set off against the other, the surplus is to be restored to the wife. But if the value of the blind slave should exceed that of the medium slave, neither party would have any claim against the other.

Section Eighth.

Of Sumuât.[2]

Sumuât described;

When a man marries a woman for a certain *sudák*, or dower, in private, and a larger amount is announced

[1] As to options, see *ante*, note p. 21.

[2] 'Sound,' 'fame,' an infinitive of the verb 'he heard.'

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in public, this is *sumuât*, and the case may present itself in two ways. First, when a dower is assigned or designated in private, and the parties then contract openly for more; here, when that which is contracted for in public is of the same kind as that which was assigned or designated in private, the difference being only in quantity, and the parties are agreed as to the private designation, or the man had called upon persons to attest as against the woman, or her guardian, that the real dower was to be that which was specified in private, and that the addition was *sumuât* or for reputation; then that which was assigned or designated in private is to be taken as the true dower. If, however, while they agree that there was a mutual assignment in private, they differ as to the terms of it, the husband claiming that the sum specified was a thousand, and the wife denying that that was the amount, the word of the wife is to be credited, unless the husband can adduce proof of his claim, and the dower specified in the contract is to be taken as the true dower. Next, when the dower contracted for in public differs in kind from that which was assigned or designated in private; and here, supposing that the parties are not agreed as to the designation in private, the dower is that which was mentioned in the contract; while, if they are agreed as to the designation, then the marriage is held to have been contracted at the proper dower of the woman. And when a man and woman have designated in private a certain amount of *deenars* as the dower, and the marriage then takes place in public, on a condition that there shall be no dower, the *deenars* designated in private are to be taken as the true dower. But if the marriage were on condition that the *deenars* should not be her dower, or entire silence were observed at the marriage in public with regard to dower, then the marriage would be held to have been contracted in both cases at the proper dower.

is of two kinds.

First, when a greater amount is expressed in the contract than has been fixed in private

In the second case of *sumuât*, the marriage is contracted in private for a certain dower, and the parties then declare in public a larger sum to be the dower. And, here, if they are both agreed as to what was designated in private,

Second, when a greater sum is declared to

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be the dower in public than has been fixed by the contract in private.

and persons had been called upon to attest that the addition in public was merely *sumuât*, or for reputation, then the true dower is that which was mentioned in the contract in private; but if there was no call on any person to attest the fact that the addition was *sumuât*, then, it is stated in the Comment on the Epitome of Tahavee, as on the authority of Aboo Huneefa and Moohummud, that the true dower is that announced in public, and that it is an addition to the first dower, whether it be of the same or a different kind; except that, when of a different kind, the whole of it is considered to be an addition to the first dower, but if of the same kind, it is only the excess over the first that is to be considered an addition to it. And the Sheikh-ool-Islam has stated that when parties have contracted in secret for a thousand, and then declared in public something different to this, and there is afterwards a dispute between them, and the husband says, 'What I acknowledged in public was a joke,' while the wife says, 'Nay, but it was in earnest,' her word is to be preferred, and the dower taken to be that which was stated in public, unless the husband can adduce proof of his allegation.[1]

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[1] Two cases are reported among the decisions of the Sudder Dewanny Adawlut of Calcutta, which appear to me to come within the second kind of *sumuât*, though the technical word does not occur in either report. In both cases the parties were of the *Sheea* persuasion, and the facts, as found by the court, were nearly the same. In both the marriage ceremony was read in the *Sheea* form, with a verbal declaration of the dower at 300 rupees, but there was a deed of settlement for a larger sum, which was said to have been entered into according to the *Soonnee* custom (the *Soonnee* sect being generally prevalent throughout the provinces under the Bengal Government), as a matter of formal observance. In the case first reported it is not very clear whether the deed of settlement preceded or followed the marriage contract, for, though drawn up before, it was not completed by the attestation of the subscribing witnesses till after the performance of the *Sheean* ceremony. It does not appear that any proof to the satisfaction of the Court was adduced of the deed of settlement having been entered into merely as a 'matter of formal observance,' which would have been substantially a plea of *sumuât*; and the Court pronounced the deed of settlement specifying the dower at 110,115 rupees to be good and valid, in preference to

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Section Ninth.

Of the Loss of the Dower, and the Establishment of a Right to it.

If the subject of dower is lost before delivery, the wife is entitled to a similar, or its value.

When a man has married a woman on a dower of something distinctly specified, and it happens to perish before delivery, or a third party establishes a right to it, she may have recourse to her husband for a similar of the thing, if it belonged to the class of similars, or otherwise for its value.[1] And, in like manner, though she should give the specific thing which is the subject of dower to her husband, and should herself establish a previous right to it, she may still have recourse to him for its value. And if a right is established to half of a mansion, which is the subject of dower, she may either take what remains and half the value, or the value of the whole mansion; but if her husband repudiates her before consummation, she has only the half that remains, without any option. When a man has married a woman on the dower of a slave who belongs to a third party, or to whom a third party establishes a right, the husband is liable for the value of the slave, unless the transaction is allowed by the third party; and if the slave should happen to come into his possession under any right, before a decree has been pronounced against him for the value, he may be compelled to make specific delivery.

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the verbal declaration of the amount at 500 rupees.—*Reports S. D. A., Calcutta*, vol. i., p. 279. In the second case, the settlement, which was for 100,001 rupees, was not merely attested and completed, but executed, subsequently to the contract. The decision was to the same effect; the Court declaring the sum specified in the settlement to be true.—*Reports S. D. A. of Calcutta*, vol ii., p. 199.

[1] This follows the analogy of sale, where the thing sold is at the risk of the seller till delivery.

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Section Tenth.

Of a Gift of the Dower, and of Gifts or Sales in lieu of Dower.

A woman may give her dower to her husband.

A woman may make a gift to her husband of whatever *sudák*, or dower, she is entitled to, whether he have consummated with her or not; and none of her guardians, not even a father, has any right to object. But a father cannot give away the dower of his daughter, according to all our learned men. A master may, however, give the *sudák*, or dower, of his female slave to her husband; so also of his *Moodubburah* and *oom-i-wulud*; but with respect to a *mookatubah*, her dower is her own, and a gift of it by her master is not valid; nor would her husband be discharged by making it over to her master. When the wife of a deceased person has given her dower to the deceased, the gift is lawful; but if she should give it while in the pangs of labour and should then die, the gift would not be valid.[1] If she should give it to his heirs, the gift would be lawful; and if she give away her dower conditionally, and the condition is fulfilled, the gift is lawful; otherwise it reverts to its former state.

Effect of such gifts when she is subsequently repudiated before consummation.

A wife being entitled to no more that half her dower if repudiated before consummation, it is necessary to consider what would be the effect of such a repudiation in the event of the wife's having previously made a gift of her dower to her husband. The case branches out into several parts, according as the dower may consist of things that have been identified to the contract, or of things that have not been so identified, and also according as possession of them may or not have been taken by the wife previously to the gift.[2] When a man has married a woman on a dower of a thousand (*dirhems* or *deenars*), of which she has taken possession and made a gift to her

When the dower consists of things that have not

[1] Or only to the extent of one third of her estate.

[2] *Inayah*, vol. ii., p. 65.

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husband, and he then repudiates her before consummation, he is entitled to have recourse against her for five hundred; because he has not got by the gift the actual thing to which he was entitled, as money does not admit of identification; and so, in like manner, when the dower consists of articles estimated by weight or capacity, or something else which, though capable in its own nature of being identified, yet was not identified at the time of the contract, but left generally on responsibility, that is, indeterminate.[1] But if she should not have taken possession of the dower before making a gift of it to her husband, and he should repudiate her before consummation, neither party would have any claim against the other; because what he is really entitled to in this case is a release from responsibility, and that he has in effect obtained by the gift of the dower. And if she should take possession of five hundred, and then make him a gift of the whole thousand, that is, as well of the portion taken possession of as of the remainder, and he should then repudiate her before consummation, neither would have any claim against the other, according to Aboo Huneefa; but if she had given him less than a half, and taken possession of the remainder, then, according to the same authority, he might have recourse to her for the whole half.[2]

been identified to the contract.

If a man should marry a woman on a dower of something that is identified by specification, such as chattels, and she should make a gift to him of the half of the whole of them, and he should then repudiate her before consummation, he could not have recourse to her for anything, whether she had or had not previously taken possession. And if he should marry her for an animal or a chattel left on his responsibility (or indeterminate), the answer would be the same, whether she had previously taken possession or not.

When it consists of things that have been identified.

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[1] *Hidayah*, vol. ii., p. 71. Dirhems and deenars, the only coined money of the ancient Arabs, do not admit of identification. Other articles estimated by weight or measure admit of identification when actually produced or pointed out at the time of the contract.

[2] *Hidayah*, vol. ii., p. 71.

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Gift of the dower to a stranger.

When a woman has given the *sudák*, or dower, to a stranger, and empowered him to take possession of it, and he has done so, and her husband then repudiates her before consummation, he may have recourse to her for half of it. Things indeterminate and determinate are alike in this respect.

Sale of the dower to the husband.

When a woman has sold her dower to her husband, or given it to him for a consideration, and he then repudiates her (before consummation), he has a claim against her for half its like, or half its value, according as the dower belonged to the class of similars or dissimilars. And if she sell it before possession she is liable for half its value as on the day of sale; but if she first took possession and then sold it, she is liable for half its value on the day of taking possession.

Difference between the parties as to terms of gift.

When the parties differ as to the terms of a gift of the dower, the woman saying, 'I gave it on condition that you would not repudiate me,' and he that it was without any condition, her word is to be preferred.

Dower,[1] in modern times, is usually a sum of money, and is not unfrequently left, in whole or in part, as a debt on the responsibility of the husband. The debt is termed *Deyn-muhr*, or dower-debt; and, like any other debt, it may be made the consideration for a transfer of property by the husband to the wife. Transfers of this kind are of common occurrence in India, where they are usually effected by writings known by the names of *Heba bil Iwuz* and *Beya Mokassa*. A short description of these may, therefore, not be improper in this place.

Heba bil Iwuz.

Heba bil Iwuz means, literally, gift for an exchange; and it is of two kinds, according as the *Iwuz*, or exchange, is, or is not, stipulated for at the time of the gift. In both kinds there are two distinct acts; first, the original gift, and second, the *Iwuz*, or exchange. But in the *Heba bil Iwuz* of India, there is only one act; the *Iwuz*, or exchange, being involved in the contract of gift as its direct considera-

[1] From here to the end of the section is an addition to the original digest.

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tion, 'And all are agreed that if a person should say, "I have given this to thee for so much," it would be a sale;'[1] for the definition of sale is an exchange of property for property, and the exchange may be effected by the word 'give,' as well as by the word 'sell.'[2] The transaction which goes by the name of *Heba bil Iwuz* in India is, therefore, in reality not a proper *Heba bil Iwuz* of either kind, but a sale;[3] and has all the incidents of the latter contract. Accordingly, possession is not required to complete the transfer of it, though absolutely necessary in gift, and, what is of great importance in India, an undivided share in property capable of division may be lawfully transferred by it, though that cannot be done by either of the forms of the true *Heba bil Iwuz*.[4]

Beya Mokassa means literally a 'set off sale,'[5] if the expression may be allowed, the consideration or price being a debt due by the seller to the purchaser, which is set off against the thing sold; and the transaction is in strict accordance with Moohummudan law.[6] The consideration being generally an unpaid dower, or *Deyn Muhr*, or a portion of it, the *Beya Mokassa* is commonly employed in India in the same way and for the same purpose as the *Heba bil Iwuz*. Both being sales, they are governed generally by the same rules as that contract. Hence, when dower is made the price or consideration in either of them, it must 'be so known and determined as to prevent any disputes between the parties'[7] regarding it; so that when

Beya Mokassa.

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[1] *Bidaut ool Mooftieen. P. P. M. L. Appendix*, p. 51, and other authorities, cited at pp. 217 and 221.

[2] *M. L. S.*, pp. 1 and 9.

[3] *Reports S. D. A., Calcutta*, vol. iv., p. 335, and *P. P. M. L.*, p. 217.

[4] *Reports S. D. A., Calcutta*, vol. iv., p. 212, and *P. P. M. L.*, pp. 189 and 217.

[5] It is a derivative from the same root as *Kissas*, retaliation. See *P. P. M. L.*, p. 96, *note;* though the learned author has been misled by Mr. Hamilton's spelling of the word *mookaiza*, which he renders *mokasa*, to confound the *Beya Mokassa* with the *Beya Mookaiza*, or Barter. *Ibid.* p. 175, *note.*

[6] *M. L. S.*, p. 137.

[7] *M. L. S.*, p. 4.

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a husband gave everything that he possessed of whatever sort in lieu of *part of the dower*,' it was held that 'how much *part of the dower* might imply being unknown,' the gift was of no avail.[1] The rule is the same with regard to the property which may be given or sold in lieu of the dower. But it does not seem to be necessary that, when it consists of land, it should be described by its boundaries;[2] nor that the gift or sale of a person's share in property, or of 'the whole of his property real and personal, without specification in exchange for dower,' would be invalid, if the share or property referred to were known to the parties, or could be sufficiently ascertained, so as to prevent disputes between them.[3] Thus, in a case decided in the Sudder Dewanny Adawlut of Calcutta,[4] it was decreed that a 'deed executed by a husband settling on the wife by gift, in lieu of dower due, all the property he possessed, was a valid instrument, and that in virtue of it the widow was entitled to take the property then possessed by her husband to the exclusion of heirs. But, as in sale it is necessary that the thing sold, as distinguished from the price, should be in existence at the time of the contract,[5] so, also, with regard to either of the transactions in question; and in the case last referred to, it was declared[6] that the gift of property then non-existent is not good in law. Further, as in sale, it is not necessary that the thing sold should be immediately delivered; so neither does a *Beya Mokassa*, nor consequently a *Heba bil Iwuz*, require possession to render it valid.

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[1] *Reports S. D. A., Calcutta*, vol. i., p. 51. Opinion of the law officer. [2] *M. L. S.*, p. 185.

[3] This appears to be opposed to the answers of the law officers, given at pp. 174 and 178 of the *P. P. M. L.*, and approved by the learned author, as being in conformity with his 13th principle. But the conformity may be questioned, and the officers were those of inferior courts. It is true that in the *Hedaya* (vol. iii., p. 65,) it is said that land must be described by its boundaries, but this is with reference to a claim or suit, not a sale.

[4] *Reports*, vol. i., p. 54. [5] *M. L. S.*, p. 3.

[6] By the law officer, in answer to a question put by the Court, (p. 54.) *P. P. M. L.*, p. 175.

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But, as an express stipulation for delay in the delivery of the thing sold when specific would invalidate a sale, so also it may be supposed that a similar stipulation would have the like effect on a *Heba bil Iwuz* or *Beya Mokassa* in lieu of dower.

Section Eleventh.

Of a Woman's right to refuse herself to her Husband on account of her Dower; and of deferring the Dower, and Matters connected therewith.

A wife may refuse herself to her husband, and to accompany him on a journey, until she receives payment of so much of her dower as is prompt.

A woman may refuse herself to her husband, as a means of obtaining payment of so much of her dower as is *Mooûjjul* or prompt; and, in like manner, her husband cannot, until such payment has been made, lawfully prevent her from going out of doors, or taking a journey, or going on a voluntary pilgrimage. All this, according to Aboo Huneefa, even after consummation, or a valid retirement. But on that point both his disciples differed from him, unless the consummation had taken place against her will, or when she was very young, or insane; in which cases they agreed with him that her subsequent resistance would be lawful, and that her father might refuse to surrender her until the prompt portion of her dower was paid to her. There was the same difference of opinion between them as to the wife's refusal to accompany her husband on a journey until payment of her dower. On this point Sheikh-As-Suffar made a practice of deciding according to Aboo Huneefa's opinion, but in the matter of refusing herself, he used to decide with the disciples, and several sheikhs have approved of this distinction.

After payment, he may remove her from place to place.

When a husband has paid his wife's dower he may remove her wherever he pleases. Many of 'our' doctors however are of opinion that he cannot take her on a journey in our times, even if he have paid her dower, though he may remove her to the villages when he pleases; and the *futwa* is in accordance with this opinion. He may also remove her from village to town and from village to village.

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Until payment he cannot prevent her father from removing her.

A man having contracted his virgin, but adult, daughter in marriage, is desirous of removing with her and his family to another town: he may do so even though objected to by the husband, when the dower has not been paid; but if the dower has been paid, she cannot be removed without her husband's consent.

If a single *dirhem* of the dower be unpaid, she may refuse herself to her husband.

Though a husband should give his wife the whole of her dower except one *dirhem*, she may refuse herself to him, and he cannot demand back from her what she may have already received.

A young girl, though given up to her husband, may be reclaimed by her guardian when the dower is unpaid.

A young girl, having been contracted in marriage, goes to her husband before possession has been taken of the *sudák*, or dower: in such circumstances the person who had the power of keeping her in the first instance before the marriage is entitled to take her back to his house, and refuse her to her husband until he pay the dower to whomsoever may be entitled to receive it. And when a paternal uncle has contracted his brother's young daughter in marriage at a specified dower, and has delivered her to her husband before possession has been taken of the whole dower, the surrender is invalid, and she is to be restored to her home.

A father is not obliged to produce his daughter before demanding her dower.

It is not a necessary condition to the demand by a father of his daughter's dower that he should actually produce her. But if the husband should demand that his wife be delivered to him, and she is at the time in her father's house, it is obligatory on the father to make delivery of her; and if she is not in his house, or he is otherwise unable to do so, he has no right to take possession of the dower. Should the husband suspect that his wife, though in her father's house, will not be delivered to him on payment of the dower, the judge should call on the father to give a surety for the dower before directing its payment to him. And if the dispute regarding the dower should take place at Koofah, while the daughter is at Bussorah, the father is not obliged to bring her to Koofah; but the husband may be called upon to make payment of the dower, and then to accompany the father to Bussorah, to receive possession of the woman there.

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Prompt and deferred dowers.

When the parties have explained how much of the dower is to be *mooûjjul* or prompt, that part of it is to be promptly paid. When nothing has been said on the subject, both the woman and the dower mentioned in the contract are to be taken into consideration with the view of determining how much of such a dower should properly be prompt for such a woman, and so much is to be *mooûjjul* or prompt, accordingly, without any reference to the proportion of a fourth or a fifth; but what is customary must also be taken into consideration.[1] Where, however,

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[1] This rule has been questioned by the learned author of the *P. P. M. L.*, who has laid it down as a principle (p. 59), that the whole of the dower is due on demand in the case supposed. The authority which he quotes (*Appendix*, p. 58, No. 22) is the *Futtawa-i-Hummadee*; and he says in a note (p. 279) that 'this is the opinion of the compiler of the *Hedaya*. But the case of a dower where nothing has been said on the subject of its being prompt or deferred, does not appear to be mentioned in that work (see vol. i., p. 150), while the doctrine of the text is confirmed by the following authorities, all of whom take notice of the custom; viz., the *Ashbaho Nuzair* with commentary (p. 254), the *Doorr-ool-Mookhtar* (p. 208), the *Munnih-ool-Ghuffar* (*P. P. M. L.*, p. 281), and the *Shurh-i-Vikayah* (p. 118). With regard to the last of these authorities, the learned author above referred to observes (note, p. 280):—'Had there been no mention whatever whether the dower should be prompt or deferred, the whole must be considered prompt. (See *Prin. Marriage, &c.*, p. 22.) This is unquestionably the law, and the author of the *Shurh-i-Vikayah* admits it to be so.' What he really says, after citing a passage from the work, on which his own is a comment, in very nearly the same terms as above given in the text, is that 'the author has entered into some detail to show that there is a difference of opinion on the subject, and that this view' (that of apportioning the *mooûjjul* according to custom and with reference to similar cases) 'has been approved, and the moderns have adopted it as being founded on what is well known and customary; although by the original doctrine she had the power of refusing her person in order to obtain the whole of her dower.' In a case decided in the Court of Sudder Dewanny Adawlut at Agra, it has been held that a wife cannot claim the whole of her dower as exigible, while her husband is alive, where no specific amount has been declared to be exigible. In such case one-third of the whole must be considered exigible (*mooûjjul*), and two-thirds not exigible (*moowujjul*), such two-thirds being only claimable on the death of the husband.—*Reports, N. W. P.*, vol. iii., p. 185.

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it has been stipulated that the whole is to be *mooûjjul* or prompt, the whole is to be so, to the rejection of custom altogether.

When the dower is exchanged for a chattel the wife may refuse herself till it is delivered.

And if he should sell her a chattel for her dower, she may refuse herself till she has obtained delivery of the chattel. And Aboo Yoosuf has said that when possession has been taken of the dower, and it is afterwards found that the *dirhems* are *zooyoof*, or alloyed, or that they are not current, she may refuse herself to him until he changes them; but if he had already consummated with her consent, and then the discovery were made of the dower being *zooyoof*, or the like; or if, in the case of the chattel, a right were established in it after he had consummated with her, she would no longer have the power of refusal.

When the dower is deferred to a term, the woman cannot deny herself at the arrival of the term, or before it.

When the dower is *moowujjul*, or deferred, to a known or definite term, and the term has arrived, she cannot deny herself for the purpose of obtaining payment of her dower, according to the principles of Aboo Huneefa and Moohummud.[1] A man has married a woman for a thousand, payable at a year, and desires to consummate with her before the expiration of the period, and without giving her anything; if he made consummation before the term a condition of contract, he may lawfully do so, and she cannot prevent him, without any difference of opinion. And though he made no such stipulation, he still may, according to Moohummud, after the analogy of sale,[2] but cannot in the opinion of Aboo Yoosuf, who controverts this doctrine, on the ground that marriage requires the delivery of the dower first, whether it be specific or indeterminate (while that is not required in sale when both the things exchanged are specific, or the transaction is, in other words, a barter[3]), and that the husband's acceptance of the delay, with a knowledge of this fact, is an assent on his part to the postponement of his right till after payment of the dower on the arrival of the term.[4]

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[1] 'As she has dropped her right by agreeing to make her dower *mowjil*.'—*Hedaya*, vol. i., p. 150.

[2] *M. L. S.*, p. 27. [3] *Ibid.*, 29.

[4] *Inayah*, vol. ii., p. 77.

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When it is partly prompt and partly deferred to a known time, the rule appears to be the same.

Where part of the dower is prompt and part of it deferred, and the woman has obtained the prompt, or when, after the contract, she has allowed it to be deferred to a known or definite term, she has no right to deny herself; but, on the principle of what has been said by Aboo Yoosuf, she would be entitled to do so until she obtain payment of the consideration, that is, the dower, on the arrival of the term.

When the dower is half prompt and half deferred, but without defining the term, the deferred is payable at the dissolution of the marriage.

If a husband should say, 'Half of it prompt and half of it deferred,' as is the custom in 'our' country, and should not mention a time for the payment of the deferred half, there is a difference among the learned upon the point; some saying that the postponement is unlawful, and that the whole of the dower is payable immediately, while others say that the postponement is lawful, and is to be construed as having reference to the time when a separation shall take place between the parties, either by death or repudiation; and there is a report as from Aboo Yoosuf which gives some confirmation of this view of the case.[1]

When the whole is so deferred.

No one has disputed that the postponement of the dower for a fixed period, such as a month or a year, is valid; but when the period has been left unfixed, there is a difference of opinion among the learned. Some of them say that the postponement is valid; and this opinion is correct, for, in fact, the period is sufficiently known of itself, being death or repudiation; and is it not seen that the postponement of a part is valid, though the time of payment should not be expressly mentioned?[2] Even a revocable repudiation hastens the payment of a deferred dower, that is, makes it prompt; and though the wife should be actually recalled by her husband, it would not again become deferred.

Any guardian may take possession of an infant's dower,

When a woman has contracted her infant daughter in marriage and taken possession of the dower, the daughter may, on coming to years of discretion, sue her for it, if she were the daughter's *wusee*, or guardian, but she has

[1] The *Bidaya* is the authority quoted.

[2] The authority cited is the *Moheet*, and see *Reports, S. D. A., Calcutta*, vol. i., p. 278.

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no claim against her husband in that case; while if the mother were not her guardian, she would have a right to sue her husband, who might have recourse against the mother. And the same rule applies to all others among guardians, except a father and grandfather. A father, grandfather, and a judge may take possession of the dower of a virgin, whether she be an infant or adult, except that when adult she may object, and her objection is valid; and no other besides them has this power. But a *wusee* may take possession of an infant's dower, though in the case of an adult daughter it is only herself who is entitled to do so. And the father of a young girl yet unenjoyed by her husband may call upon the husband for payment of her dower.

but only a father, grandfather, or judge, that of an adult.

Section Twelfth.

Of Disputes relating to the Dower.

Disputes — when they may occur, and to what they may relate.

Disputes regarding the dower may take place between the married parties themselves in their lifetime, or between their heirs when both are dead, or, after the death of one of them, between his or her heirs and the survivor. When the disputes arise in the lifetime of the parties, it must be either before or after repudiation. And in all cases the disputes may relate either to the amount of the specified dower, or to the fact of any dower having been specified in the contract.[1]

When the dispute arises during the marriage, and relates to the amount of the dower,

When a dispute arises between the married parties, at any time during the subsistence of the marriage, regarding the amount of the dower, the proper dower is to be assumed as the standard of probability; and if it bear witness in favour of one of the parties, his or her word and oath are to be preferred as against the claim of the other. In other words, the word and oath of the wife are to be preferred up to the full amount of her proper dower, but as to anything beyond that, the preference is to be given to the word and oath of the husband.[2] Thus, if the husband

and it is money,

[1] *Kifayah*, vol. ii., p. 86.

[2] *Hidayah*, vol. ii., p. 85.

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should say that the dower is a thousand, and the wife should say that it is two thousand, the husband's word and oath would be preferred, when the proper dower is a thousand or less; and the oath to be taken by him would be in these terms—'By God! I did not marry her at two thousand *dirhems*;' if then he should refuse the oath, the excess would be established against him by his refusal, while if he take the oath, the excess is not established. But if either party should adduce proof to the matter, it is to be decreed in his or her favour; and if both of them should adduce proof, preference is to be given to the proof of the wife, and decree passed accordingly. If, on the other hand, the proper dower were two thousand or more, preference would be given to the word and oath of the wife, and the oath would be propounded to her in these terms—'By God! I did not marry for a thousand;' if then she should refuse, the thousand would be established by her refusal, while if she should take the oath, she would be entitled to the two thousand. But here again, if either party adduces proof, judgment is to be given for that party; while if they should both adduce proof, preference must be given to that of the husband. If, again, the proper dower be one thousand five hundred, both parties are to be sworn, and if the husband refuse the oath, judgment is to be given for two thousand; while if the wife refuse, judgment is to be given for one thousand; and if both should take the oath, the decree is to be for one thousand five hundred.

or anything else that is indeterminate.

If the dower were anything else than money that is indeterminate, and were left on responsibility, that is, not produced and delivered, as, for instance, something measurable by capacity and described, or something weighable and described, or something measurable by length and described, and the parties should differ as to the quantity in measure, weight, or length, the case is to be determined in the same way as when there is a difference as to the amount of *dirhems* or *deenars*. So also, where the subject of the dower is specific, but the parties differ as to what it was, the husband saying, 'I married you for this male slave,' and the wife saying, 'For this female slave,' the

Where the subject of dower is specific.

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case is to be determined in the same manner as that of the difference as to *dirhems* and *deenars*, except in one point, which is that when the proper dower is equal to or more than the value of the female slave, it is the value and not the slave herself that the wife is entitled to. Where, however, they are agreed as to what the dower was, but it has happened to perish in the husband's hands before delivery, and they then differ as to its value, the word of the husband is to be preferred. But if there should also be a difference as to what the subject of the dower was, the husband saying, for instance, 'I married you for my black slave, whose value was a thousand, and he has died in my hands,' and she saying, 'Nay; but you married me for your white slave, whose value was two thousand, and he has died in your hands,' decree must be given for the proper dower, and both parties be sworn, if the amount of the proper dower be between their claims, that is, bear witness for neither.

When the difference takes place after repudiation.

If the parties should differ after repudiation, and the repudiation had not taken place till after consummation or a valid retirement, the case is to be resolved in the same way as if the difference had taken place during the subsistence of the marriage; but if the repudiation had taken place before consummation or a valid retirement, and the subject of the dower were indeterminate, the difference between the parties being as one and two thousand, the word of the husband would be preferred, and the sum mentioned by him would be halved. If, however, the amount admitted by the husband were so low that the half of it would not be equal to the *mootaut*, or present, of women of like condition, the wife would be entitled to a *mootaut*.

When the dispute is as to the fact of a dower having been specified in the

And if the difference be as to the fact of any dower having been mentioned in the contract, one of the parties asserting and the other denying that it was, the proper dower is incumbent; and on this point all are agreed. But it is not to exceed what is claimed by the woman, if she be the party who insists that it was mentioned; nor

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to fall short of what is alleged by the husband, if he be the party insisting that it was mentioned. contract, and it occurs before repudiation. When after it.

If the difference should occur after repudiation, in a case where there has been no consummation, a *mootaut*, or present, is due by general agreement.

If the difference does not occur till after the death of one of the parties, the answer is the same as if it had occurred in the lifetime of both, and during the subsistence of the marriage, both as regards the amount and the fact of a dower having been specified in the contract. When the dispute arises after the death of one of the parties.

If both the parties have died, and a dispute arises between their heirs as to the amount of dower specified, the word rests with the heirs of the husband, and there is no exception in the case of a *moostunkir*, according to Aboo Huneefa. Two explanations have been given of this term. One of these is that it means a person who claims to have married the woman for less than ten *dirhems*, and some of the learned have adopted this explanation; and the other is that it is a person who claims to have married the woman for something which it is not usual for such women to be married for; and this interpretation has been adopted by many of the learned, and it is the correct one. When it arises after death of both, and relates to the amount,

And if a dispute should take place between the heirs of both the parties as to the fact of a dower having been mentioned, the word is with the person who denies the fact, and nothing is decreed to the wife, according to Aboo Huneefa; but according to his disciples, decree is to be given for the proper dower, and the *futwa* is said to be in accordance with their opinion. When both husband and wife are dead, and the fact that a dower was fixed for her is established either by proof or by the admission of the heirs, her heirs may take this from the estate of the husband,—that is, when it is known that the husband died first, or that they both died together, or the precedence is unknown; but if it be known that she died first, the share of the husband, as an heir, is to be deducted from it. And if the heirs agree as to the non-mention of a dower at the time of the contract, decree is to be given for her proper dower, according to a saying of or to the fact of a dower having been specified.

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the two companions, and the *futwa* is in accordance therewith.

Husband cannot be compelled to give a writing for the dower.

When a husband refuses to give a writing for the dower, he cannot be compelled to do so; and if *deenars* should be mentioned in a written settlement of dower, when the contract itself was really in *dirhems*, *dirhems* are due, and not *deenars*, as by the writing. He [1] has said that this is as between him and his conscience, but that the judge should compel him to render *deenars*, unless he knows that the contract was in *dirhems*.

Dispute as to things sent by the husband to the wife being in part of the dower.

When a husband has sent anything to his wife, and she alleges that it was as a present, while he insists that it was on account of the dower, his word is to be preferred, except as to things actually prepared for eating, such as dressed meats and fruits that will not keep; with regard to those her word is to be preferred, on a favourable construction; contrary to the case of articles not actually ready or prepared for eating, such as honey, butter, nuts and almonds in the shell. And the lawyer Aboo Leeth has reported, as the approved doctrine with regard to household stuffs, which it is not incumbent on a husband to provide his wife with, such as *khooff* (shoes, boots, or socks), *moolá't* (a mantle or scarf), and the like, his word is to be preferred; but as to such as it is incumbent on a husband to provide for his wife, such as a *khumar* (veil), *dira* (shift), and things required for the night, he cannot reckon them as in part of the dower. With regard to *mal*, or property generally, when a man gives it to his wife, and says it was a part of the dower, while she alleges it was for maintenance, his word is to be preferred, unless she adduce proof.

Section Thirteenth.

Of Repetitions of the Dower.[2]

Cases of re-marriage after repudiation.

A man having said to a woman, 'As often as I marry you, you are repudiated,' married her three times in one

[1] Aboo Huneefa is probably meant.

[2] This section is in the nature of an exercise on dower in connec-

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day, consummating with her on each occasion; in these circumstances two repudiations take effect on her, and he is liable for two dowers and half a dower, according to the analogy of the opinions of Aboo Huneefa and Aboo Yoosuf; because, as soon as he has married her the first time one repudiation takes place on her, and he becomes liable for half the dower by reason of its being before consummation; then, when he has consummated with her (though it is to be remarked of this consummation that there is a doubt regarding it, for, according to Shafei, a repudiation which is made dependent on marriage does not take effect), she becomes liable to observe an *iddut*, and when he has married her the second time—she being in her *iddut*—another repudiation takes effect upon her, and this is one that admits of being revoked,[1] according to Aboo Huneefa and Aboo Yoosuf, (for, in their opinion, when one marries a woman in her *iddut*, and then repudiates her before consummation, the effect is the same as of a repudiation after consummation, even though the *iddut* have been induced by a dubious consummation, and such a repudiation is susceptible of being revoked, and induces a full dower); hence the husband is rendered liable by it for the amount mentioned in the second marriage, so that two dowers and a half unite against him; but the third marriage is not valid, because it took place during an *iddut* after a reversible divorce, so that it is not accounted a third marriage, and cannot induce a third dower; and he is not liable for a third dower by consummation after the third marriage, for it was in reality connection with his own wife.[2] But

tion with repudiation, and cannot be well understood, even with the aid of the parenthetical explanations and the notes, till the reader has perused the third book.

[1] The first repudiation did not, because it took place before consummation.

[2] The two dowers and a half are thus made up: the half dower for the first repudiation before consummation, one whole dower for the consummation; and another whole dower for the second marriage. Though repudiation takes place on the instant of the second contract, as of the first, it is a repudiation that can be revoked, and is revoked by the consummation which follows (a renewal of matrimonial inter-

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if he should say, 'As often as I marry you, you are repudiated *absolutely*;' and should then marry her three times, and have connection with her each time, she would be repudiated thrice absolutely, and he be liable for five dowers and a half, according to the analogy of the opinions of Aboo Huneefa and Aboo Yoosuf, viz.: a half dower under the first marriage, a proper dower by reason of the first consummation, a full dower by the second marriage, a proper dower by the second consummation (though dubious as already mentioned), a full dower by the third marriage, and a proper dower for the dubious connection, making, in all together, five dowers and a half.[1] And when a man has married a woman and had connection with her, after which he repudiates her absolutely, and then marries her again during her *iddut*, and repudiates her again before connection under the second marriage, she has one dower for the first marriage, and a full dower for the second marriage, according to Aboo Huneefa and Aboo Yoosuf, and she has to undergo another *iddut* according to them. And though, instead of being repudiated under the second marriage, she should become absolutely separated from him by reason of an act proceeding from herself, such as apostasy, or submitting to the son of her husband, he would still be liable, according to them, for the whole dower; or if, being a slave, she were emancipated after the second marriage, and should avail herself of her option before connection, still, according to them, the husband would be liable for a full dower under the second marriage.[2] And when a woman has married a man who is not her equal, and consummation follows, and the matter is then brought by her guardian before the judge, and he separates the parties, and imposes both dower and

Cases of re-marriage after separation for causes proceeding from the wife.

course being a revocation by deed); and consequently the third marriage not taking effect there is no more dower.

[1] The difference between this and the preceding case is in the repudiation being absolute, and not admitting of revocation.

[2] Because, I suppose, the right to dower was perfected by the *iddut*, which here comes into the place of consummation, and being once perfected it does not abate.

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iddut in consequence, and the man then marries the woman again, without the consent of her guardian, and the judge again separates them before connection under the second marriage, she is entitled to another full dower, and is bound to the observance of another *iddut*, according to Aboo Huneefa and Aboo Yoosuf. A man has married a young girl who was contracted to him by her guardian, and has connection with her; she then arrives at puberty, and avails herself of her option, and is separated from him; after which he marries her again during her *iddut*, and then repudiates her before connection: he is liable for the full dower, according to them, and she is bound to the observance of a future *iddut*.

Or for separation on account of invalid contract.

And, in like manner, if a man should marry a woman by an invalid contract, and having connection with her, a separation should then be made between them, and he should marry her a second time during her *iddut* by a lawful contract, and then repudiate her before connection, the full dower is incumbent upon him, and another *iddut* incumbent upon her, according to Aboo Huneefa and Aboo Yoosuf.

Cases of erroneous intercourse where the act is repeated.

If one should have connection with the maid of his son, or the maid of his *mookatubah*, or a woman under an invalid marriage, repeatedly, he is liable for only one dower. The principle is this: that when a man has had intercourse with a woman repeatedly in a case of *shoobh*, or semblance of property, each act of intercourse does not induce a separate dower, because the second connection meets his own property, and that when connection takes place repeatedly in a case of *shoobh ishtibah* (where the semblance exists only in an erroneous impression in the mind of the party), it induces a separate dower for each instance of connection, because every such connection meets the property of another. Hence if a son should have connection with the female slave of his father repeatedly, and then claim the benefit of a *shoobh*, or semblance of property, he is liable in a dower for each instance of connection; while, if one should have connection with the female slave of his wife, or with his own

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mookatubah repeatedly, he is liable for only one dower; but if one of two partners should have connection with a partnership slave repeatedly he would be liable in half the dower for each instance of intercourse; and if the woman were his *mookatubah*, held in joint property with another, he would be liable in respect of his own half for half of one dower, and in respect of the half of his partner for another half a dower for each instance of connection; the whole becoming the right of the *mookatubah*.

If a man should have connection with a woman in her *iddut* after three repudiations, and plead *shoobh* or semblance of right, it has been said, that if the three repudiations were together, or given at the same time, and he supposed that they did not take effect on her, that is, make a complete divorce, there would be some ground for the plea, and only one dower would be due, though the act were repeated. But if he supposed that the repudiations had actually taken effect, but that still it was lawful for him to have intercourse with her, that would be a supposition without any reasonable ground for it, and he would be liable for a dower, for each act of intercourse. When a man has purchased a maid, and had intercourse with her repeatedly, and a right to her is established by a third party, he is liable for only one dower; and if the right be only to half the maid, he is liable for half a dower to the party entitled.

Case of illicit intercourse followed by marriage.

A man commits fornication with a woman and then marries her, while still on her person; he is liable for two dowers, one the proper dower, on account of the fornication, and the other, the dower which is named or appropriate to the marriage.

Case of illicit intercourse by a boy.

When a boy has illicit intercourse with a girl, he is liable for her dower, but not on his mere acknowledgment of the act; and when a boy has such intercourse with a free adult woman, and her virginity is lost, if she were unwilling, the boy is liable for her dower; but if she were willing, and had solicited him to her embraces, he would not be liable for any dower. When a girl solicits a boy to her embraces, and her virginity is lost in conse-

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quence, he is liable for her dower, for even her order is not valid to the effect of cancelling her right; contrary to the case of the adult woman. And when a female slave solicits a boy, and he has illicit intercourse with her, he is liable for her dower; for her command would have no force with regard to the right of her master.

Equivalent to the proper dower.

What is intended by dower in these places is the *ookr*, and with regard to its amount, it is reported in the Hoojjut, as from Aboo Huneefa, that he said in explanation of the *ookr*, that it is that for which the woman's like or equal might be married, and the *futwa* is to that effect.[1]

Miscellaneous cases of erroneous intercourse.

A man marries a woman, and his son marries her daughter, and each woman is brought (by mistake) to the husband of the other, and connections take place, one after the other: in these circumstances the man who has first had connection is liable for the whole dower of the woman with whom the connection has taken place, and for half the dower of his own wife, and the other man, whose connection was second in respect of time, is not liable for the dower of his own wife; and if the connections took place simultaneously, nothing would be due by either to his own wife. A man and his son marry two women who are strangers, or not related to each other, and each of the women is brought (by mistake) to the husband of the other, and connections take place; in these circumstances each of the men is liable for the *ookr* of the woman with whom he has had connection, but neither is liable for the dower of his own wife. Two brothers marry women, one of whom is the mother of the other, and each of the women is brought to the husband of the other, and connection takes place in both instances; Aboo Yoosuf says that each woman becomes absolutely divorced from her husband, and each husband is liable to his own wife for

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[1] In the Jowhurrah it is stated that the *ookr* in the case of free women is their proper dower, and in the case of slaves is a tenth of the value if the woman were a virgin, and half of that, or a twentieth of the value, if she were a *suyyib*. *Doorr-ool-Mookhtar*, p. 203.

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half her dower, and to the woman with whom he has had connection for her *ookr*, and that it is not lawful for either of them after this to remarry his own wife; but that the husband of the mother may marry the daughter with whom he has had connection, while the husband of the daughter cannot marry the mother. And, in like manner, if there were no relationship between the husbands, there would be no difference in the results.

A woman is brought to another than her husband, and he has connection with her,—he is liable for her proper dower, and has no claim against the person who brought her; and if the woman be the mother of his wife, his wife becomes unlawful to him and is entitled to half her dower, on account of the necessary separation before consummation. The wife of a father is brought before consummation to his son who has connection with her; the father has no recourse against the son for half the dower, for the son himself is liable for the proper dower. But if the son should kiss her with desire to vitiate the marriage, the father would have recourse to the son for half the dower, as the son would not be liable for dower in such circumstances.

Section Fourteenth.

Of Suretyship in Dower.

A father may be surety for dower to his daughter.

When a person has married his daughter to a man, whether she be a child, an adult virgin, or insane, and has become surety on behalf of the man for the dower, the suretyship is valid, and the woman has her option of suing the husband or the guardian[1] when she is legally competent to sue; whereupon the guardian, after he has paid, may have recourse against the husband if he became surety by his direction. A person marries his daughter to a man at a dower of two thousand *dirhems*, and calls upon

[1] That is, the father; but any other guardian may, in like manner, be surety for the dower. *Hidayah*, vol. ii., p. 83.

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others to attest against himself that he has married such an one to such an one for two thousand, 'one thousand out of my own property and one thousand by such an one,' and the husband accepts. In these circumstances, the whole dower is payable by the husband, and the father is his surety for one thousand; which, if taken by the wife from him or his estate, he or his heirs may reclaim from the husband. When a man has married his infant son to a woman, and become his surety for the dower, and the transaction has taken place while the father was in good health, the suretyship is valid if accepted by the woman; and if the father should pay the dower while in health, he has no right to reimbursement from the son, on a favourable construction of law, unless there was a condition in the original security, that he should be entitled to such reimbursement. The woman, however, may claim the dower from the guardian (that is the father), but she is not entitled to claim it from her husband (the son) till he attains to puberty; and when he arrives at that state she may demand it from either of them at her pleasure. When a son is adult and his father while in health becomes surety for him, without his authority, and then dies, and the woman takes the dower from his estate, his heirs have no right of recourse against the son, according to general agreement. Insane persons are like minors in this respect, All this when the suretyship is effected in a state of health, but when it is given in a death illness it is void; for the intention of such a transaction is to give some special advantage to an heir which a sick person is prevented from doing, and it is therefore not valid.

And for his son.

When a person addresses a woman on behalf of another and becomes surety to her for the dower, saying 'I am directed to do so,' and the woman enters into the contract accordingly, and after this the husband appears and admits both that he sent the messenger to make proposals on his behalf and that he gave him the instruction as to security, in these circumstances the marriage is valid, and the security is valid also if the messenger is a person capable of

Case of a person addressing a woman on behalf of another and becoming surety for the dower.

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being a surety; and if the messenger should pay under his suretyship, he may have recourse to the husband for the amount so paid. If, again, the husband should disavow the instructions as to the security, but admit the authority to make proposals, the marriage is valid, and the security is so likewise as between the woman and the messenger, though not so as against the husband; so that the woman may revert to the messenger for the *sudák*, or dower, but the messenger has no such right of recourse against the husband for anything he may have paid. While if the husband should deny both the instructions for security and the sending to make proposals, and the messenger has no proof that he was sent, the marriage is void, and no dower is due by the husband, though the woman may still claim against the messenger for a part of the dower, according to some reports, and for the whole according to others. But if the person in making proposals to the woman should say, 'the party does not give me any instructions, but I will marry you to him and will be surety for the dower, and perhaps he may confirm it,' and she enters into the contract accordingly, but the husband denies the message, the whole is void. An agent for marriage, when he becomes surety to the woman for the dower, and makes payment, may have recourse to the husband if this were done by his directions, but not otherwise.

Section Fifteenth.

Of the Dower of Zimmees *and* Hurbees, *or unbelieving subjects and enemies of the Mussulman community.*

Whatever is fit for dower in a *Mooslim* marriage is fit for it in that of *Zimmees.*

Whatever is fit for dower in the marriage of *Mooslims* is fit for it in the marriage of *Zimmees;* and what is not fit for dower in the marriage of *Mooslims* is not fit for it in the marriage of *Zimmees*, with the exception of wine and the hog. And if a *Zimmee* should marry a *Zimmeeah* for carrion or blood, or should marry her without any dower, the parties either expressly declaring that there shall be

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none, or remaining silent with regard to it, and, such a contract being lawful with them, connection should follow, or the woman be repudiated before it, or the *Zimmee* should die leaving her his widow, she would have no dower in either case, according to Aboo Huneefa. And it would be the same, though both the parties should subsequently embrace the faith, or one or both of them should bring the matter before 'our' tribunals. In like manner, if two *Hurbees*, or enemies, should contract in the *dar ool hurb* (or foreign country) for carrion or blood, or on a condition that there shall be no dower, the woman would have no dower, with the concurrence of our three masters; whether the parties should subsequently embrace the *Mooslim* faith, or concur in bringing the matter before our tribunals.

Where the dower is something that is not property, or there is no dower, the wife has no claim.

If a *Zimmee* should marry a *Zimmeeah* for wine or a hog, and both or one of the parties should subsequently embrace the faith, then if the wine or hog were specific, and possession had not taken place, she would have no right except to the specific thing; but if the wine or hog were indeterminate, she would in the case of the former have its value, and of the latter the proper dower. This was the opinion of Aboo Huneefa, while Aboo Yoosuf held that she would have the proper dower whether the thing were specific or indeterminate, and Moohummud that she should have the value in either case. All this, however, is on the supposition that possession has not been taken before conversion to the faith, for if it has been taken before that event the wife has nothing further. And if he should repudiate her before consummation she would have, according to Aboo Huneefa, half of the thing specified where the dower is specific, and where it is not, half of the value in the case of the wine, and a *mootaut* or present in the case of the hog.

When it is something that has no legal value for *Mooslims*, and both or either of the parties embraces the faith.

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Section Sixteenth.

Of a Daughter's Juhaz.

A *juhaz* by a father to his daughter cannot be revoked after delivery.

If a man should give a *juhaz*, or marriage outfit, to his daughter, and should deliver it to her, he cannot afterwards (on a favourable construction) reclaim it from her; and the *futwa* is in accordance with this.[1] But if people belonging to the woman should take anything from the husband at the time of its delivery, the husband may reclaim whatever he may have so given, for it is a bribe.

But before delivery it is not binding on the father.

If a man should give his adult daughter in marriage, and make her a *juhaz* of specific things, but without delivery, and should then break off the contract, and marry her to another, she has no right to demand that *juhaz* from the father.

Nor would delivery to another for her be sufficient.

And if a man should give something to his *oom-i-wulud*, in order that she may make a *juhaz* for her daughter, and she does so, and delivers it to her, the delivery is not valid unless it be made to the daughter by the father himself.

Mixed cases where the *juhaz* is partly made by the woman herself or her mother.

A young girl has woven or collected a *juhaz* with property partly belonging to her mother and father, and partly acquired by her own labour while she was under and after she had attained to puberty, after which her mother dies, and her father delivers the whole *juhaz* to her; in such circumstances, her sisters have no right to claim their share in it on account of what belonged to the mother. A woman weaves many things in the house of her father out of silk belonging to him, and the father dies; all these are hers from a regard to custom. And if a mother should prepare a *juhaz* for her daughter out of goods belonging to the father, doing so in his presence or with his knowledge, and he should remain silent, and the woman is led away to her husband, the father has no power

[1] The reason of its being only a favourable construction does not appear, for the near relationship is a sufficient bar to the revocation of the *juhaz* considered only as a gift.

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to reclaim this from his daughter. And in like manner if the mother should spend in the *juhaz* what is customary, without any objection on the part of the father, she is in no way responsible.

Dust Pyman.

A man having married a woman gives her 3,000 deenars as a *dust pyman*,[1] and she is the daughter of a rich man, who gives her nothing as a *juhaz*, the Imam-Jumal-ood-deen and the author of the Mooheet have decided that in such a case the husband can demand a *juhaz* from the father to such an amount as is usual and customary, and if he should not make such a *juhaz* the husband may demand back the *dust pyman*; and this is approved by the learned. A man excites the expectations of another by saying, 'I will marry my daughter to you at a great *juhaz*, and I wish from you a *dust pyman* of so many *deenars*,' the man thereupon takes a *dust pyman*, and gives it to him without receiving the *juhaz*, there is no report as to such a case further than that the Sheikhs of Bokhara have answered, that if the father do not give his daughter a *juhaz* the husband may recall so much of the *dust pyman* as is above what is suitable to a woman of like condition. The proper ratio of a *juhaz* to the *dust pyman*, according to other authorities, is that for every *deenar* of the *dust pyman* there should be three or four *deenars* of the *juhaz*; and if the father does not give in this ratio the husband may reclaim his *dust pyman*; but the Imam Al Moorgheenanee has said that the correct doctrine is that he cannot have recourse to the father of the woman for anything, since property is not the object designed or intended in marriage.

Miscellaneous cases.

A man made a *juhaz* to his daughter, but died before delivery, and the rest of the heirs demanded their share out of the *juhaz*; in these circumstances, if the daughter was adult when the *juhaz* was made, the remaining heirs are entitled to their share out of it; but if she were an infant at that time the heirs would not be entitled to any share; for in the former case there would have been no

[1] The phrase means literally something measured by the hand.

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possession, but in the latter the father is considered to have taken possession on her account. A woman having given up her chattels to her husband, saying, 'Sell these, and expend it on the marriage,' and he does so,—he is liable to her for the value. A woman being possessed of slaves, says to her husband, 'Expend on account of them out of my dower,' and he does so, whereupon she says, 'I will not allow it, as out of my dower, because you had the service of the slaves,'—according to Abool Karun, what may have been expended on them according to custom is to be ascribed as having been paid out of the dower.

Section Seventeenth.

Of Disputes between the Married Parties respecting the Household Effects.

How disputes are to be adjusted when they arise between the parties themselves.

Aboo Huneefa and Moohummud have said that when married parties differ as to effects placed in the house in which they both reside, whether the difference arise during the existence of the marriage or after a separation has taken place, in consequence of an act either of the husband or of the wife, then things that by custom appertain to women, as the different articles of female attire are the wife's, unless the husband adduce proof to the contrary, and what appertains to men, such as armour or articles of male attire, are the husband's, unless the wife can adduce proof to the contrary; and what may belong to men and women, as a slave, a servant, a bed, a sheep, a bull, &c., belong to the man also, unless the woman can adduce proof to the contrary. And when one of the parties dies, and a dispute arises between the survivor and the heirs of the deceased, then, according to Aboo Huneefa and Moohummud, what is fit or appropriate to men belongs to the man if he be the survivor, or to his heirs if he have died, and what is appropriate to women belongs in like manner to the woman or her heirs; and what is appropriate to both belongs, according to Moohummud, to the man if he be

Or between one of them and the heirs of the other.

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living, or to his heirs if he be dead; but Aboo Huneefa was of opinion that what is doubtful belongs to the survivor, and things that relate to trade or merchandise, if the man was known to be engaged in matters of the kind, belong to the man.

When one is a slave and the other free, &c.

If one of the parties be free and the other a slave, whether inhibited or licensed, or a *mookatub*, the whole effects belong to the free person, whichever of the two may happen to be free; but, according to the disciples, such is the case only if the slave be inhibited, and if he be licensed or a *mookatub* the rule is the same as in the case of two free persons; and if one of the parties be *Mooslim* and the other *Kafir*, or unbeliever, the rule is the same as if they were both *Mooslims*; and if one of them be under puberty and the other above it, or both be under it, it is stated in some reports that they are to be considered equal. And if both be slaves or *mookatubs*, the word with regard to the effects is as has been described. Nor is there any difference in these cases, whether the house in which they are residing be the property of the husband or of the wife. And if there be any other person in the family besides the wife, as, for instance, the son in the family of the father, or the father in the family of the child, and the like, the effects belong, in a case of doubt, to the party who supports or maintains the family.

Disputes when a man has several wives living in one house.

If a man have several women, and a dispute arises between him and them with regard to the effects, then if they all be in one house the effects that appertain to women are to be divided between the women equally; and if each of them be in a separate house by herself, then what is in the home of each woman is between her and the man, in the manner already described, without any participation on the part of the other women.

Miscellaneous cases.

If a woman should declare with regard to any particular article that she purchased it from her husband, the thing is his (in the first instance), and the burden of proof lies upon her. And if they differ with regard to the house in which they are residing, both laying claim to it, the word rests with the husband; but if she should adduce proof, or

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they should both adduce proof, judgment is to be given on the proof of the wife. And if a mansion be in the possession of a man and woman, and she adduces proof that the mansion is hers and the man her slave, and he adduces proof that the mansion is his and the woman his wife, whom he married for a thousand *dirhems*, which he delivered to her, but does not adduce proof that he is free, judgment should be given for both mansion and man as the property of the woman, and that there is no marriage between them; but if the man adduces proof that he was free by origin, and all the other circumstances of the case are the same, judgment should be given for the freedom of the man, and the marriage of the woman, and that the house is her property. And if they differ with regard to things that appertain to women, and both adduce proof, judgment is to be given according to the proof of the husband.

Continued When a woman has spun cotton the property of her husband, and they afterwards dispute regarding the thread, whether before separation or after it, then, if he had given her permission to spin, by saying, 'Spin it for me,' the thread is the husband's and she has no claim against him to anything for her labour; but if he had specified a fixed hire for her, she would be entitled to that; while if the hire be uncertain, or he had stipulated that the thread and the cloth should belong to both, the thread would be the husband's and she would be entitled to the hire due for similar work. And if they should differ as to there being any hire, she saying, 'I spun it for hire,' and he saying 'without hire,' the word is the husband's with his oath.[1] But if he had said, 'Spin it for yourself,' the thread is hers and nothing is due by her. And if they differ with regard to the permission, he saying, 'I permitted you to spin for me,' and she saying, 'Nay, but you said, "Spin it for yourself,"' the word is the husband's with his oath. And if he said, 'Spin it that the thread may be ours,' the thread is

[1] That is, his word is to be preferred, and to be credited if confirmed by his oath.

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his and she has the hire due to similar work; but if he say, 'Spin it,' without adding anything more, the thread is his. And if he forbid her to spin, but she does spin notwithstanding, the thread is hers, but she is liable to her husband for a similar quantity of the cotton. And if they differ upon this point, the owner of the cotton saying, 'You spun it with my permission,' and she saying, 'I spun it without your permission,' the word is his. And if he carry cotton to his house, and say nothing, and she then spins it, if the husband be a seller of cotton, the thread is hers, and she is liable for a similar of this cotton; but if he be not a seller of cotton, and insist that he gave her permission, the word is his; in like manner as if she were to cook food of meat brought by him, the food is the husband's. And so also if they dispute about the linen, he saying to the woman, 'You gave it to the weaver to weave it with my permission,' and she saying, 'I gave it without your permission,' the word is the husband's. In the Book of Marriage of Aboo Leeth it is stated, that a woman spun cotton belonging to her husband with his permission, and they were in the practice of selling the cloth made from it, and purchasing with the price things for their joint necessities, and also of making of some of the stuff clothes for the household; in such circumstances all this stuff and what was purchased out of its proceeds belong to the husband, except only things which he may have actually purchased for her, or which it is known from custom must have been purchased for her, and these belong to her.[1]

[1] These cases may not be of much use in themselves, but they serve to illustrate the relation of the married parties to each other in respect of property.

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CHAPTER VIII.

OF INVALID[1] MARRIAGES AND THEIR EFFECTS.

SECTION FIRST.

Of the Distinction made by Aboo Yoosuf and Moohummud between Invalid and Void Marriages.

Definition of invalid marriages.

AN invalid marriage is one that is wanting in some of the conditions of validity, as, for instance, the presence of witnesses.[2] In this sense, every marriage that is unlawful, and, consequently every marriage contracted between a man and any of the nine classes of women who are unlawful or prohibited to him, is invalid. But when a *Mooslim* has intermarried with one of his *mooharim*,[3] and she is delivered of a child, its descent is not established from him, according to Aboo Yoosuf and Moohummud, because the marriage is void[4] in their opinion; while, according to Aboo Huneefa, the descent of the child is established from the husband, because in his opinion the marriage is only invalid.[5] *Mooharim*, according to us (that is, all of the Hanifite sect), are women whom a man is perpetually interdicted from marrying, by reason of consanguinity, affinity, or fosterage—and even though the affinity be by illicit intercourse—including, therefore, the

Difference of opinion as to marriages with *Mooharim*;

who they are.

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[1] *Fasid*, literally 'vicious,' or 'vitiated,' and opposed to *suheeh*, 'sound,' or 'healthy,' and used synonymously with *ghuer jaiz*, or 'unlawful.'

[2] *Doorr-ool-Mookhtar*, p. 207.

[3] An irregular plural of *muhrumut*, literally, 'a place of prohibition,' but applied to a woman who is prohibited or unlawful.

[4] The original word *batil* means 'vain,' 'futile,' and 'ineffectual.'

[5] *Fut. Al.*, vol. i., p. 727.

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mother and daughter of the woman, and the father and son of the man, with whom the illicit intercourse has taken place, but excluding the sisters and aunts, paternal and maternal, of a wife.[1] A *Mujoosee* woman is rendered lawful by *Islam*, or by conversion to the Christian or Jewish religion; a thrice repudiated woman, by consummation with a second husband, and expiration of her *iddut*; and the *mooâtuddah* of another, by the expiration of the *iddut* alone. Accordingly, none of these women can be said to be perpetually prohibited to a man—consequently they are not *mooharim*.[2] By parity of reason, it can be shown, that of all the other women who are unlawful or prohibited to a man, it is only those that are prohibited by reason of consanguinity, affinity, or fosterage, that are his *mooharim*. Of these only, therefore, can it be predicated that marriage contracted with them would be void, in the opinion of Aboo Yoosuf and Moohummud.

A passage in the *Hidayah* which seems to extend the difference of opinon to all unlawful women,

But it is said in the Hidayah, that when a *Mooslim* has married a woman whom it is not lawful for him to marry, and has had connection with her, the *hudd* is not to be inflicted, according to Aboo Huneefa, though a discretionary punishment is to be imposed, if he were aware of the illegality; but according to Aboo Yoosuf, Moohummud, and Shafei, the *hudd* is to be inflicted if he were aware of the illegality,—because the contract does not meet with a fitting subject; as a fitting subject is that which can be lawfully used, and there is none such here, for the woman is of the *muhrumát*, or prohibited. Aboo Huneefa, on the other hand, was of opinion that the contract does meet with a fitting subject, because all the daughters of Adam being qualified for procreation, which is the primary object of marriage, are fit subjects for that contract.[3] If connection under the contract exposes the parties to the *hudd*, the connection itself must be *zina*,[4] and the fruit of it illegitimate,[5] and, consequently, it would seem that the marriage itself must be void; which is probably what is meant by the con-

[1] *Al Ashbahowa al Nuzair*, p. 588. [3] *Hidayah*, vol. ii., p. 592
[2] *Ibid.*, p. 589. [4] *Fut. Al.*, vol. ii., p. 208.
[5] *Ante*, p. 3.

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tract not meeting with a fitting subject. At first sight, then, it would seem that whenever a *Mooslim* intermarries with any woman that it is unlawful for him to marry, the marriage is void, according to Aboo Yoosuf and Moohummud. But the reason which is assigned for their opinion that the woman is not a fitting subject for the contract, is that she is of the *muhrumát*. Now this term is synonymous with *mooharim*, both words being plural forms of the same singular;[1] and it might, therefore, I think, be fairly inferred that it was only of *mooharim*, or women perpetually prohibited to a man—in other words, those who are prohibited to him by reason of consanguinity, affinity, or fosterage—that the author of the *Hidayah* meant to assert that connection with them, though under the sanction of marriage, would expose the parties to *hudd*, in the opinion of Aboo Yoosuf, Moohummud, and Shafei. But it must be admitted that the word *muhrumát* is also sometimes applied to all women who are unlawful or prohibited to a man; and it is, therefore, desirable to show, if possible, in some other way, that it is in the restricted, and not in the general sense, that the term is used in this passage.

shown to mean only the same classes.

When a *Mooslim* marries a woman whom it is not lawful for him to marry, he is liable to the *hudd*, according to the author of the *Hidayah*. The connection, therefore, must be *zina*, and if it can be shown that it is only to intercourse with *mooharim*, or women who are perpetually prohibited to a man, that the term *zina* is applicable, even according to Aboo Yoosuf and Moohummud, when the intercourse has taken place under the sanction of marriage or slavery, then it will equally follow that it was only of such women the author of the *Hidayah* was speaking when he said that the intercourse would expose the parties to *hudd*.

Similar result,

There are two kinds of unlawful intercourse between the sexes—one that is unlawful in itself, the other that is unlawful for something else.[2] The former is *zina*; the latter is not *zina*.[3] When the man has no right in the woman,

shown in another way.

[1] *Muhrumát* is the regular, *mooharim*, the irregular plural of *muhrumut*.

[2] *Inayah*, vol. ii., p. 496. [3] *Hidayah*, vol. ii., p. 639.

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or, having such right, she is perpetually prohibited to him, the intercourse is unlawful in itself; when the prohibition is temporary, the intercourse is unlawful for something else.[1] And Aboo Huneefa made it a condition of a perpetual illegality—that it should either be generally allowed, or founded on some well authenticated tradition, to remove all doubt on the subject;[2] that is, of course, in the absence of any positive precept of the Koran. With regard to women who cannot be lawfully joined together, connection with them is not unlawful in itself, but only for a temporary or incidental cause, that is, the man's having a right over both of them at the same time, which may be removed by his repudiating or disposing of one of them, and therefore the connection is not *zina*.[3] Much less should it be so in the case of a marriage with one sister during the *iddut* of another, or of a fifth wife during the *iddut* of a fourth. Moreover, there is some difference of opinion with regard to such marriages, for Shafei, the head of the third of the orthodox sects, held them to be lawful.[4] Again, with regard to persons who are prohibited from intermarrying by reason of a difference of religion: though it is unlawful for a Mussulman to have connection with a *mujoosee* woman, the connection is not unlawful in itself, for the objection to it may be removed, as already observed, by the change of religion; and the connection is therefore not *zina*.[5] The same reason is applicable to his connection with any other idolatress, and to the marriage of a *Mooslimah* with a man of a different religion from her own; for the objection in both cases is equally removable by a change of religion.

The real difference of opinion confined to the three first classes of unlawful women.

It will be now seen, on referring to the third chapter, that of the nine classes of women who are unlawful or prohibited to a man, the sixth, the seventh, and ninth classes have been disposed of by showing, either from direct authority or by parity of reason, that they are not per-

[1] *Hidayah*, vol. ii., p. 640.
[2] *Ibid.*
[3] *Inayah*, vol. ii., p. 496.
[4] *Hedaya*, vol. i., pp. 88-89.
[5] *Inayah*, vol. ii., p. 496.

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petually prohibited; and that the fourth and sixth classes have been in like manner disposed of, by showing from express authority, or by parity of reason, that intercourse with them, when sanctioned by right on the part of the man, would not be *zina*, which amounts to the same thing. There remain the fifth and eighth classes, or slaves married upon free women, and persons who are forbidden to each other by reason of property. The illegality of the first is merely in the order in which the marriage takes place; for there is no objection to a man being the husband of a slave and a free woman at the same time, provided that he has married the slave first; and the illegality, such as it is, may be removed either by the repudiation of the wife, or the emancipation of the slave. There can be no ground, therefore, for calling it perpetual. With regard to the other of the two classes, it has been expressly stated that marriage with one's own slave is no marriage at all, and that if one of a married pair becomes the property of another, the marriage is *batil*, or void;[1] as if the two relations of master and slave, and husband and wife, are so incompatible that they cannot exist together in the same person. It is, however, said in another place that the marriage is only invalid.[2] Leaving this class as doubtful, it is only of the three first classes of women, or those who are prohibited by reason of consanguinity, affinity, or fosterage, that it can be said that they are *mooharim*, or perpetually prohibited, or that intercourse with them, when under the sanction of marriage, would expose the parties to *hudd*. Of them only, therefore, can it be averred that marriage contracted with them would be void, according to Aboo Yoosuf and Moohummud.[3] According to Aboo Huneefa, the marriage even in these cases would be only invalid.[4] It is difficult to say which of the opinions has been

[1] *Antè*, p. 42. [2] *Post*, p. 157.

[3] See *ante*, p. 30, where Moohummud is said to have stated in his book of marriage, that marriage is not taken away or dissolved, but only rendered invalid or vitiated, by the prohibition of affinity or fosterage.

[4] See *ante*, p. 3.

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adopted by the learned, Asbeejany maintaining that the opinion of Aboo Huneefa is valid,[1] while the lawyer Aboo Leeth seems to have given his adherence to that of the disciples, and said that the *futwa* is in accordance with it.[2] According to an authority cited in another place in the Futawa Alumgeeree,[3] the opinion of Aboo Huneefa is entitled to preference absolutely over that of the two disciples even when they are agreed, and unquestionably so when they differ. It would seem that the compilers of that work have adopted it in the present instance; for, though they have given this chapter the heading, 'Of *Fasid* marriages and their effects,' they have omitted to give any description of the marriages to which that title is applicable; as if, with Aboo Huneefa, they had rejected the distinction of *batil*, or void marriages, altogether. Their evident inclination to the opinion of Aboo Huneefa gives great additional weight to it, and ought, perhaps, to be decisive of the question in India.

Marriage contracted without witnesses is only invalid.

There is still the marriage without witnesses, of which some notice is necessary, because of the saying of the Prophet, 'There is no marriage without witnesses,' and the tradition is what is termed *mushhoor*, or notorious. Yet Malik, the leader of the second of the Orthodox sects, held such marriages to be lawful,[4] perhaps because he rejected the tradition as not sufficiently authentic. However that may be, there seems to be no doubt that the marriage in question is only *fasid* by general agreement. This is expressly stated by the author of the *Inayah* in one part of his work,[5] and in another,[6] as well as in the definition at the head of this section, a marriage without witnesses is adduced as an example of *fasid* marriages, or such as are only invalid.

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[1] *Fut. Al.*, vol. ii., p. 210.

[2] *Fut. Al.*, vol. ii., p. 210. The Moozmirat is cited, but it is not very clear which of the opinions he adopted.

[3] *M. L. S.*, Introduction, p. 59.

[4] *Hedaya*, vol. i., p. 74.

[5] *Inayah*, vol. ii., p. 269.

[6] *Ibid.*, p. 74.

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Section Second.

Of the Effects of Invalid Marriages.

The parties must be separated,

When an invalid marriage has taken place, it is the duty of the judge to separate the parties; and if the wife be unenjoyed she has no claim to dower, but otherwise she is entitled to whichever may be the less—of her proper dower, and the dower specified, when any has been named; and when none has been named she is entitled to the full proper dower whatever it may be; and it is incumbent on her to observe an *iddut*, which is to be reckoned from the date of the separation, according to our three masters.

and wife must observe an *iddut*.

Repudiation of an invalid marriage is a relinquishment.

Repudiation under an invalid marriage is, according to the Mujmooa Nuwazil, a relinquishment, and does not fail by falling short of the full number.[1] A relinquishment is not effected after consummation without the employment of speech, as, for instance, the husband's saying, 'I have set your way free,' or, 'I have relinquished you.' A mere denial of the marriage is not sufficient; but if with the denial the man should say at the same time, 'Go and marry,' that would amount to a relinquishment; and the refraining of one of the parties to come to the other after consummation has taken place, does not effect a relinquishment.

Either party may cancel an invalid marriage.

According to the author of the Moheet, a relinquishment cannot be effected without the employment of speech even before consummation. But before consummation one of the parties may cancel the marriage without the other being present, though this cannot be done after consummation, except in the presence of the other. When one of the parties has relinquished, authorities differ as to the necessity of the other being made acquainted with the fact; one saying that this is a necessary condition of the validity of the relinquishment, while

[1] To make a complete divorce, there must in general be three repudiations.

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another says that it is no more necessary than in a case of repudiation.

Iddut not incumbent for the death of the husband.

An *iddut* on account of death is not incumbent in the case of an invalid marriage,[1] nor is maintenance, and if there should be a composition or agreement for maintenance in an invalid marriage it would not be lawful.

Nusub, or paternal descent of the child, is established from the husband.

The *nusub*, or paternal descent of a child born of an invalid marriage, is established in the husband, without any claim on his part;[2] and the period of gestation is to be reckoned from the time of consummation, according to Moohummud, and the *futwa* is in accordance with his opinion, as stated by Aboo Leeth.

Invalid marriage has no legal effect before consummation;

but after, it has generally the same effects as a valid marriage.

An invalid marriage has no legal effect before consummation; so that if a man should marry a woman by a contract which is invalid by reason of his having previously touched her mother with desire, and should then relinquish the wife, he might lawfully marry the mother. But after consummation it is joined to valid marriages as to its effects,[3] one of which is the establishment of *nusub*, or the child's paternity,[4] as already mentioned. But still the parties do not become *Moohsins* by means of the consummation, and if he should have intercourse with her after the separation he would be liable to the *hudd*, or specific punishment for *zina*. When a free man has purchased his wife, his marriage is rendered *fasid*, or invalid,[5] contrary to the case of a *mazoon*, or licensed slave, purchasing his wife, which has no such effect. And when a man has married a woman by an invalid contract and retired with her, after which she has been delivered of a child, and he denies the consummation, there are two reports of Aboo Yoosuf's opinion on the point, according to one of which the paternity is established, and both dower and *iddut* incumbent, while the other is quite the reverse; but if he had not retired with her, he could not

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[1] That is, no special *iddut* of death; the *iddut* for consummation being all that is required under an invalid marriage, though it should be dissolved by the husband's death.

[2] *Doorr-ool-Mookhtar*, p. 207.

[3] *Hidayah*, vol. ii., p. 465.

[4] *Inayah*, vol. ii., p. 379.

[5] See *ante*, p. 154.

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be rendered liable for the paternity. When a repudiated woman has married and said subsequently that she was in her *iddut*, it is to be considered whether there was between the repudiation and the marriage less than two months, and if so she is to be credited, and the marriage is vitiated or rendered invalid; but if there were two months or more, she is not to be credited, and the marriage is valid.

Case of a woman with two husbands, to whom does the issue belong;

A man is absent from his virgin wife for years, and she marries and has children; or a woman is taken captive and married to an enemy and has children; or a woman claims to be repudiated, keeps *iddut*, marries another husband and has children; or her husband's death is announced to her, and she keeps *iddut*, marries with another and has children:—the offspring, according to Aboo Huneefa, belongs to the first, whether he deny or claim it, or whether the second deny or claim it, or the child is born within six months, or at the distance of more than two years; and the second husband may spend his *zukat* (or poor's rate) on such children, and their testimony may be received on his behalf. But Jurjanee has reported from Aboo Huneefa, that the children belong to the second husband, and that he came back to this opinion, and that the *futwa* is in accordance with it. Kazee Khan and the Sirajiyiyah are also to the same effect, and Sudur ool Shuheed used so to decide. Zuheer ood Deen, however, alleges that the *futwa* is for the children belonging to the first, since the child follows the bed according to *nuss*, or express authority. And if the first husband were present, and all the circumstances were the same, the child would belong to the first.[1]

[1] Though it is left doubtful to which of the husbands the child belongs, yet the case is of some value as an illustration of Aboo Huneefa's opinion, that no marriage is void.

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CHAPTER IX.

OF THE MARRIAGE OF SLAVES.

The marriage of a slave without his master's consent is dependent on his sanction.

THE marriage of a male slave, whether *kinn* (or absolute), *mookatub*, or *moodubbur*, and the marriage of a female slave, whether *kinn* or *oom-i-wulud*, when entered into without the permission of his or her master, is in suspense. If allowed by him, it is operative; if disallowed, it is void. And when a male slave marries with his master's consent, he becomes personally liable for the dower; and if a *kinn*, he may be sold on account of it, but not so if he be of any of the other classes, when he would only have to work out the dower by his labour. When a slave has once been sold on account of dower, he cannot be sold again if the price be deficient (though the balance may be demanded of him if he should ever acquire his liberty), because when he is sold, it is for the whole dower, which is but one debt. This is contrary to the case of a wife's maintenance, for which a slave husband may be sold repeatedly. If the slave should die, both dower and maintenance would be at an end. When a man contracts his male slave in marriage, and then sells him, the dower adheres to him as a debt wherever he goes—in the same way as a debt which he may have incurred by destroying property. And when a man, after marrying his slave to a free woman, emancipates him, the woman has an option, and may proceed either against the master or her husband for the loss of the slave's value and the specified dower. A man contracts his *moodubbur* in marriage to a woman, and then dies, the dower is a debt on the slave's person, for which he may be seized after he has become free.

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A master may compel his slaves to marry.

A master may compel all his slaves to marry, with the exception of the *mookatub* and *mookatubah*, over whom he has no such power, even when they are under puberty. If he should contract them in marriage while under age, without their consent, the marriage would be dependent on their allowance of it. Yet, what is very curious, if the ransom were paid, and the minor should in consequence become fully emancipated, no regard need be paid to their wishes, as the patron or the ruler would then become entitled to act for them on his own sole discretion.

Dower of a female slave belongs to her master.

Whatever is due on account of dower to a female slave, whether she be *kinn*, or *moodubburah*, or *oom-i-wulud*, and whether it be due by the contract, or in consequence of consummation, belongs to her master; but the dower of a *mookatubah*, and of a slave partially emancipated, is her own property. A man contracts his female slave in marriage, or she contracts herself with his consent, and she is afterwards emancipated, though she has the option of emancipation the dower still belongs to her master.

How the master's sanction of a marriage entered into without his permission may be established.

When a slave has entered into a marriage without the permission of his or her master, the master's sanction may be established in various ways. It may be given expressly, as by his saying, 'I have allowed it,' or 'Am satisfied with it,' or 'I have permitted it.' Or it may be inferred from what he says or does in regard to it; as, for instance, if he were to say in the slave's hearing, 'This is good,' or 'right,' or 'well what you have done,' or 'God's blessing on it,' or 'No harm from it,' or if he were to send the woman a dower, or anything else, provided it were not as a present. In the case of a male slave who has married without his master's permission, if the master should say to him, 'Repudiate her revocably,' that would be a sanction of the marriage; but not so, if the words were, 'Repudiate her,' or 'Be separated from her.' The reason of the difference is that the word 'repudiation' (*tulák*) and the word 'separation' are as applicable to the rejection or relinquishment of an invalid contract as to repudiation of one that is valid; and the first construction is preferred as being more

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probable when the expressions are used towards a refractory or disobedient slave; while when the word 'repudiation' is qualified by the word 'revocably,' it implies that the contract previously entered into was valid, for none other admits of revocable repudiation.[1] It may be observed that permission to marry is not the sanction of a marriage that has already taken place; and that if a woman should marry without witnesses, and her master gives his sanction to the marriage in the presence of witnesses, it would not be valid.[2]

Repudiation under a marriage contracted without the master's consent is a relinquishment.

When a *kinn*, or a *mookatub*, or *moodubbur*, or the son of an *oom-i-wulud*, marries without the permission of his master, and, before the marriage has received his sanction, repudiates his wife three times, the repudiation is a relinquishment, not a true repudiation; so that, though pronounced only once, it would not fail by reason of its falling short of the full number; and if the slave should have intercourse with the woman after the repudiation, he would be liable to the *hudd*, while the master's subsequent allowance of the marriage would not re-establish or render it effectual. Even if he were to grant the slave permission to marry, and the slave should then contract himself to the same woman, it would be abominable for him to marry her, though if he should do so the parties are not to be separated.

By whom a slave may be contracted in marriage.

A female slave may be contracted in marriage, not only by her master himself, but by his father or grandfather when he is a minor, and by an executor, judge, *mookatub* and a *moofawiz* or universal partner; but neither a *mazoon* or licensed slave, nor a licensed youth, nor a *moozarib*,[3] nor an *inan* or commercial partner, has any such power. And none of these persons, except the master himself, can contract a male slave in marriage. Nor is it lawful even for a father or executor to contract the

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[1] *Inayah*, ii., p. 86. [2] See *ante*, p. 10.

[3] The managing partner in a *moozarubut*, or contract in which the capital is contributed by one party, and the labour and skill by the other, with an agreement for mutual participation in the profit.

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female slave of a minor to a male slave of his own. When a man marries his female slave to his male slave she is not entitled to any dower as against her master. And such being the case, if a man should marry the female slave of his son to his son's male slave, the marriage would be lawful according to Aboo Huneefa and Moohummud; for, as the dower in that case is not a debt on the person of the slave, no injury is done to the son, and the act is therefore within the father's power. If one of two masters should give their female slave in marriage, and consummation should follow, the other may dissolve the marriage; and if he does so he is entitled to half the proper dower; while the person who gave her in marriage is also entitled to whichever may be the less of half the proper dower, or half the dower specified in the contract.

Case of a male slave permitted to marry for himself as dower.

When a man has permitted his male slave to marry on his own neck—that is, giving himself as the dower—and he does so, contracting himself to a slave, or *moodubburah*, or *oom-i-wulud*, with the consent of their masters respectively, the marriage is lawful, and the male slave becomes the property of the master. But if the slave were to marry a free woman on his own neck, the marriage would not be lawful; and, in like manner, if he were to marry a *mookatubah*, it would be void. Here it is implied that the permission to marry a woman is couched in these express terms, 'on his own neck;' for, if the permission were to marry a woman, without the addition of the words 'on his neck,' and the slave should marry a free woman, or a *mookatubah*, or an *oom-i-wulud*, 'on his neck,' the marriage would be lawful on a favourable construction at the value of the slave, provided that his value be only equal to, or not greatly in excess of, the woman's proper dower; but if the excess be beyond reasonable bounds the marriage is not lawful, insomuch that, if he were to consummate with her, he could not be followed for the dower until he obtain his freedom. When a slave marries 'on his own neck,' without the permission of his master, but the master afterwards sanctions the marriage, then, if the marriage were to a slave, a *moodubburah*, or *oom-i-wulud*, the sanc-

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tion would take effect, and the marriage be valid; but not so if it were with a free woman, or a *mookatubah*, for in that event the sanction would not be effectual. In the case of the free woman, however, if the slave had enjoyed her, he would be liable for the less of his own value and her proper dower; and if the intercourse should take place after the master's sanction the liability would attach to the slave's person, and he might be lawfully sold for it, unless his master should ransom him; but if it had taken place before the sanction, he could be seized for what he is liable for only after emancipation. In the case of the *kinn*, or *moodubburah*, or *oom-i-wulud*, if the slave had enjoyed her, and this took place after the master's sanction, the liability would be for the slave's neck to the master of the female; and the result would be the same, though the intercourse had taken place before the sanction; but, according to some opinions, it would be so only on a favourable construction of law.

Case of a *mazoon*, or licensed slave, who is in debt, being contracted in marriage.

When a man contracts his *mazoon*, or licensed slave, who is in debt, to a woman, the marriage is lawful, and the woman takes equally with the other creditors, if the dower do not exceed her proper dower; but if it exceed that, she can only come in for the excess after the other creditors have been satisfied in full, as in the case of debts contracted in a death-illness, when opposed to debts contracted in health.

Effect on dower of a cancellation of female slave's marriage by an act of her master.

If the master of a female slave should sell her to her husband before consummation, the dower falls to the ground; for a woman separated by her master before consummation (and the dissolution consequent on the husband becoming the owner of his wife is here ascribed to her master) is like a free woman who apostatizes, or kisses her husband's son, with desire, before consummation. The same result would follow if the woman were emancipated before consummation, and she should avail herself of her option to separate from her husband. And if her master should sell her to a third party, who takes her away from the city, or conceals her in a village where her husband has no access to her, the right to demand payment of the

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dower is suspended until he bring her back, when he would be entitled to it. When there is an intermediate sale to a third party, from whom the husband buys her, he becomes liable for half the dower to her original master. If a female slave should marry without the permission of her master, and he should have connection with her, the marriage would be dissolved; and so, also, if he kiss her with desire, whether he know the fact of her marriage or not. When a person has only an incomplete right of property in a female slave—as, for instance, when he has purchased her without taking possession, and gives her in marriage—though the contract is lawful if the sale be completed; yet it is void according to Aboo Yoosuf, if the sale be dissolved. Moohummud held a different opinion upon the point, but the *futwa* is in accordance with that of Aboo Yoosuf.

A mere *right* of property is sufficient to prevent the inception of a marriage, but not its continuance.

It is a general rule of marriage, as already mentioned, that no one can marry his or her slave, and a mere *right* of property is sufficient to prevent the inception of marriage, but not its continuance. As, for instance, in the case of an invalid sale, when the parties have a right of reversal, this right prevents the seller from intermarrying with a female slave who may be the subject of sale; but if he should marry her to his son, and then die so that the right of reversal would rest in the son, that would not invalidate the son's marriage until the right were actually exercised and the sale reversed. Yet, if the son should not marry her till after the death of his father, the marriage would not be valid. In like manner, when a male slave is exchanged for a female slave, and the seller of the male obtains possession of the female, and marries her to her seller, after which the male, being still undelivered, perishes, the right of reversing the sale, which thence arises to the seller of the female, does not invalidate the marriage already contracted, though if the death of the slave had occurred before the contract the marriage would not be lawful. So, also, when a *mookatub* purchases his own wife, or the wife of his master, the marriage is not invalidated in either case; but if he should repudiate his

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wife absolutely, and then desire to re-marry her, it would not be lawful for him to do so. And so, likewise, if a father should die, leaving his daughter the wife of his *mookatub*, or of his slave to whom he has bequeathed his freedom, and if the deceased were drowned in debt, the marriage of his daughter would not be invalidated; as, in such a case, until the debts were satisfied, she would have a mere right of property in her husband.

A master is not obliged to let his female slave live with her husband.

When a man has given his female slave in marriage he is not obliged to let her live with her husband in his house, as the master is still entitled to her service, and her husband must have intercourse with her as opportunity offers. Even if it were made a condition that the master should house her, or let her live with her husband, still it would not be binding on him, as such a condition is not required by the contract. When a master does allow his female slave to reside with her husband she is entitled to maintenance, including a fit habitation, as against the latter, in exchange for the matrimonial restraint; but even after such permission, the master may recall her to his service, for his right to that continues as a consequence of his right of property in her, and is no more cancelled by his permitting her to live apart than it is by his giving her in marriage.[1] The same is true with respect to a *moodubburah* and *oom-i-wulud*. And it has been said with regard to a *kinn*, or absolute slave, that when her master has permitted her to reside with her husband, and she still continues occasionally to serve her master without any requisition on his part, that her right to maintenance from her husband does not cease; and the same also with regard to the *moodubburah* and *oom-i-wulud*.

But if she is allowed to do so the husband must maintain her.

The practice of *izl* allowable.

A person gives his female slave in marriage—the permission as to *izl*[2] rests with the master. The practice of *izl* is not accounted abominable, with the consent of a wife if she be free, or of her master if she be a slave; and with one's own slave it is lawful without her consent. And it is said that a wife may take remedies to procure abortion

Query as to abortion.

[1] *Hidayah*, ii., p. 99.

[2] *Extrahere ante emissionem.*

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till there is the appearance of life in the *fœtus*; that is, till the completion of one hundred and twenty days.

Option of emancipation.

When a female slave has married with the permission of her master, or the master has given her in marriage, and she is subsequently emancipated, she has an option, and may either abide by the marriage or separate herself from her husband, whether he be free or a slave. And it makes no difference whether the marriage were with or without her consent. This is called the option of emancipation, and there are several points in connection with it which are worthy of remark. 1st. It is available only to females and not to males. 2nd. It is not invalidated by mere silence; but is so by any word or act indicative of approval of the marriage on the part of the woman. 3rd. It is also invalidated by rising from the meeting. 4th. Ignorance of the option is, however, a sufficient excuse; so that, though the woman were informed of her emancipation, yet if she were unacquainted with the fact of her having an option, the option would not be invalidated by her rising from the meeting, according to the great body of the learned, although contrary to the opinion of Aboo Tahir al Dubbas. 5th. Separation by virtue of the option of emancipation does not require the decree of a judge.

Does not extend to male slaves.

When a male slave marries without the permission of his master, and is afterwards emancipated, the marriage is valid, and he has no option. And in like manner, if he should be sold, or his master should die, and the marriage be allowed by the purchaser or the heir, as the case may be, it would be valid, and the slave have no option.

Nor to a female slave who has married without her master's permission.

When a female slave marries without the permission of her master, and he allows the marriage, her dower belongs to him, whether he afterwards emancipates her or not, and whether consummation takes place after the emancipation or before it. And if, without altering the marriage, he should emancipate her, the contract would be lawful, and she would have no option; but, with regard to the dower, if consummation had not taken place, she would herself

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be entitled to it; while if the marriage were consummated before the emancipation, the dower would belong to her master. This supposes her to be adult at the time of the emancipation; but if she were under puberty, the marriage would continue dependent on the allowance of the emancipator, unless she had another agnate besides him; and if she have such agnate, and he should allow the marriage, it would be lawful; subject, however, to her option of puberty when she arrives at that state, unless the sanctioner of the marriage were her father or paternal grandfather, when she would have no such option. If the slave who marries without her master's permission be a *moodubburah*, and he should happen to die, leaving property enough for her emancipation to be made good out of the third, the marriage would be lawful; but if the third were inadequate for that purpose, the marriage would not become lawful, according to Aboo Huneefa, until she had worked out her freedom by emancipatory labour, though, in the opinion of both his disciples, it would be lawful without such condition. When an *oom-i-wulud* marries without the permission of her master, and he then emancipates her, or dies leaving her surviving, the marriage is lawful if it had been consummated before the emancipation, but not otherwise.

Disposal of dower when the option is exercised.

When an emancipated slave in exercise of her option elects to separate from her husband, and this is done before consummation, she has no right to dower; and if done after consummation, the specified dower is her master's; while if she elect to adhere to her husband, the specified dower belongs to her master, whether the marriage were consummated or not.

A slave married to the father or son of her master does not become an *oom-i-wulud*.

When a man marries the slave of his son, and she bears him a child, she does not become his *oom-i-wulud*, and he is liable for her dower; but the child is emancipated against his brother by reason of propinquity. In like manner when a man has married the slave of his father and she bears him a child, the mother does not become his *oom-i-wulud*, though the child is emancipated against the father. And when a father has begotten a

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child on the slave of his son under an invalid contract of marriage, or under a *shoobh*, or semblance of right, she does not become his *oom-i-wulud*, according to 'us' (that is, of the Hanifite sect).[1]

Effect of a slave being emancipated at request of a wife or husband.

A free woman, under a slave (that is, being his wife), says to his master, 'Emancipate him on my account for a thousand,' and he does so, the slave is emancipated, the marriage is invalidated, the dower fails, and she is liable to the master for the thousand. In like manner, if a man having a female slave under him should say to her master, 'Emancipate her on my account,' and the master should do so, the slave would be emancipated and the marriage invalidated, the *wula* belonging to the emancipator, according to Aboo Huneefa and Moohummud.

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[1] The authority cited is the *Mubsoot*, but it seems to be hardly consistent with what is stated in the *Hedaya*, vol. i., p. 170, unless the authorities may be reconciled by the omission in the *Mubsoot* of any claim to the child on the part of the father, while that is expressly said in the *Hedaya* to be necessary.

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CHAPTER X.

OF THE MARRIAGE OF INFIDELS.[1]

Who are infidels.

EVERY unbeliever in the Mussulman religion is termed *kafir*, or infidel, and infidels who are not in subjection to some Mussulman State are generally treated by Moohummudan lawyers as *hurbees*, or enemies. Marriage with them is not entirely interdicted even in such circumstances, though it is subject to some restriction. A few words, therefore, on the general principles that seem to regulate the intercourse of Mussulmans with persons of other religions, whether they are natives of the same or of different countries, may not be improper in this place, as an introduction to the proper subject of the chapter.

Of Nationality.

The inhabited world is divided into *Dar-ool Islam*

A country that is subject to the government of Mussulmans is termed *Dar*[2]*-ool-Islam*, or a country of safety or salvation, and a country which is not subject to such government is termed *Dar-ool-hurb*, or a country of enmity. Hence the term *hurbee*, or enemy. Though Moohummudans are no longer under the sway of one prince, they are so bound together by the common tie of *Islam* that as between themselves there is no difference of country,[3] and

[1] *Kooffar*, pl. of *kafir*. A great deal of opprobrium attaches to this word, as to the parallel term *infidel* with us.

[2] Infinitive of the word *daru*, 'he went round,' and commonly applied to a mansion or house, with its appurtenances, as well as to a country.

[3] *Shureefea*, p. 19.

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they may therefore be said to compose but one *dar*. And, in like manner, all who are not Moohummudans, being accounted as of one faith, when opposed to them,[1] however much they may differ from each other in religious belief, they also may be said to be of one *dar*. The whole world, therefore, or so much of it as is inhabited and subject to regular government, may thus be divided into the *Dar-ool-Islam*, which comprehends Arabia and all other countries subject to the government of Mussulmans, and the *Dar-ool-hurb*, which comprehends all countries that are not subject to Mussulman government.

and *Dar-ool-hurb*.

How a country belonging to one *dar* may be transferred to another.

A country that was once comprised in the *Dar-ool-hurb* may change its character and become a part of the *Dar-ool-Islam*, on a single condition, which is the public exercise within it of *Mooslim* authority. But it requires three conditions, according to Aboo Huneefa, to convert a country that once formed a part of the *Dar-ool-Islam* into *Dar-ool-hurb*; and these are—1st, the public exercise of infidel authority, and the non-exercise of *Mooslim* authority within it; 2nd, that it be joined to the *Dar-ool-hurb* without the interposition of any *Mooslim* city or community; and 3rd, that there does not remain within it a true believer, or a *zimmee*, in the original state of security which he enjoyed either by virtue of his religion, or his submission, previous to the conquest of the country by infidels. This state of things may be induced in three different ways—1st, by a people of the enemy conquering a *dar* or country belonging to 'us;' or 2nd, by the people of a Mussulman city apostatizing and gaining the mastery over 'us,' and issuing infidel orders; or, 3rd, by a people under subjection to 'us' breaking their compact of submission, and gaining the ascendancy over 'us.' But in none of these three cases does the country become *Dar-ool-hurb*, except on the three conditions before mentioned, according to Aboo Huneefa. Aboo Yoosuf and Moohummud were, however, of opinion that *Dar-ool-Islam* may become *Dar-ool-hurb*, on the single condition of the public

[1] *Shureefea*, p. 12.

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exercise within it of infidel authority; and this is agreeable to analogy.[1]

The people of the *Dar-ool-Islam* are Mussulmans or *zimmees*.

The *ahl*, or people of a country in the *Dar-ool-Islam*, may be Mussulmans or *zimmees*—that is, persons who though unbelievers in the Mussulman religion have, by submission[2] to the *jizyut*, or poll tax, become entitled to the free exercise of their own religion, and generally to the same privileges as their Mussulman fellow-subjects.[3]

Those of the *Dar-ool-hurb* are *hurbees*.

The *ahl*, or people of a country in the *Dar-ool-hurb*, are, *primâ facie*, all *hurbees*,[4] or enemies, since the law does not recognize the state of *zimmut*, or subjection to foreigners, as applicable to Moohummudans.

Persons in one *dar* living with permission in another are termed *Moostamins*,

Persons belonging to one *dar* may obtain permission to reside in a country comprised in the other *dar*, for trade or other purposes, and in that condition are termed *Moostamins*, as having obtained protection;[5] but being under no obligation to continue their residence longer than they please they are presumed to have the *animus revertendi*,[6] or intention of returning to their own *dar*, and therefore do not lose the *dar* to which they originally belonged, nor acquire that of the country in which they are temporarily located, being still constructively inhabi-

and retain their own *dar* until their connection with it is cut off.

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[1] *Fut. Al.*, vol. ii., p. 380. Two of the conditions of Aboo Huneefa can hardly be said to meet in the case of British India; and while there was a Mussulman king, in name at least, at Delhi, and the revenues were collected, under the authority of a firman by one of his predecessors, and the current coin bore his name, there was certainly some ground for the doubt which I have frequently heard expressed by learned Moohummudans, whether the territories were so completely severed from the *Dar-ool-Islam* as to have legally become *Dar-ool-hurb*. The deposition of the king, and the assumption of the government by Her Majesty in her own name will now leave free scope for the opinion of Aboo Yoosuf and Moohummud, and ought I should think to remove every trace of this doubt from the Moohummudan mind.

[2] *Zimmut*—hence the word *zimmee*.

[3] *Fut. Al.*, vol. ii., p. 273.

[4] *Ibid.*, p. 336.

[5] *Iman*, of which *Moostamin* is a derivative.

[6] *Niyyut oor Roojoo'a*, literally as above rendered.

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tants of their own *dar*,[1] until their connection with it is cut off in the manner hereinafter mentioned.

A foreigner entering the *Dar-ool-Islam* without permission may be slain or enslaved. Permission should not exceed one year.

If a foreigner should enter the *Dar-ool-Islam* without protection, he may be slain, or reduced to slavery, or protection may be granted to him. His acts in the meantime are in suspense; if he is slain or made a slave they are void; but if protection be granted to him, they become operative.[2] Foreigners, even when allowed to come into the Mussulman territory as *Moostamins*, or under protection, ought not to be allowed to prolong their residence beyond one year;[3] and it is the duty of the rulers to give them warning to that effect, while the period may be shortened, if that is thought proper, to one or two months.[4]

How from *Moostamins* they become *zimmees*,

If they neglect the warning, and continue their residence beyond the period prescribed by the notice, they become *zimmees* on its mere expiration, and liable to the *jizyut*, or poll-tax; after which they can no more leave the territory and return to their own country.[5] The same liabilities are incurred by the purchase of land subject to the *kharaj*, or land-tax, which, so soon as it is imposed on a *Moostamin*, has the effect of converting him into a *zimmee*.[6] But the mere purchase of the land has not that effect, provided he disposes of it before the *kharaj* is due. Nor does he become a *zimmee* by taking the land on lease;[7] nor by marrying a *zimmeeah* woman, for he may repudiate her and return to his own country, and is therefore not bound to the place.[8] But if a woman of the enemy's should enter the Mussulman territory under protection and marry a *zimmee*, she would become a *zimmeeah*, because she is bound to the place as following her husband.[9] When a foreigner becomes a *zimmee* or a Mussulman, his connection with his own *dar* is cut off in the eye of the

and connection with their own *dar* is cut off, and junction to the *Dar-ool-Islam* effected.

[1] *Kifayah*, vol. ii., p. 118.
[2] *Hidayah*, vol. ii., p. 806.
[3] *Fut. Al.*, vol. ii., p. 334.
[4] *Hidayah*, vol. ii., p. 766.
[5] *Ibid.*, and *Inayah*, vol. ii., p. 582.
[6] *Inayah*, vol. ii., p. 582, and *Fut. Al.*, vol. ii., p. 334.
[7] *Ibid.*
[8] *Hidayah*, vol. ii., p. 766. His marriage with a *Mooslimah* would be unlawful.
[9] *Ibid.*

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Moohummudan law, and he becomes a member of the *Dar-ool-Islam*.

A *Mooslim's* connection with his own *dar* is not cut off until he is judicially pronounced to have joined to h *Daro l-hurb*.

When an apostate from the Mussulman religion has fled to a foreign country, and is judicially declared to have joined the *Dar-ool-hurb*, he becomes civilly dead, his *moodubburs* and *oom-i-wuluds* are immediately emancipated, the debts for which he was liable become instantly payable, and whatever he may have acquired during his profession of the Faith passes at once to his heirs.[1] But it is necessary that he should be judicially pronounced to have joined himself to the *Dar-ool-hurb*, because there is a possibility of his repentance and return;[2] and if, before the judge's decree to that effect, he should return as a *Mooslim*, his condition is the same as if he had uniformly continued to be so.[3] Even though his return should not be till after the judge's decree pronouncing him to have joined the *Dar-ool-hurb*, he is still entitled to take back any part of his specific property that he may find in the hands of his heirs, though he cannot reclaim his *moodubburs* and *oom-i-wuluds*, because the decree having been pronounced on valid evidence cannot be cancelled.[4] By parity of reason, it would seem that a Mussulman who entered a foreign country as a *Moostamin*, and apostatizes there, is not cut off from his own *dar* till judicially pronounced to have joined himself to the *Dar-ool-hurb*.

Nor a zimmee until he has broken his compact of subjection.

The contract of *zimmut*, or submission, by means of which the *zimmee* is entitled to protection, is not dissolved by his refusing to pay the *jizyut*, or poll-tax, or by his slaying a *Mooslim*, or having illicit intercourse with a *Mooslimah*, or blaspheming the Prophet, or otherwise than by his joining himself to the *Dar-ool-hurb*, or engaging in actual warfare with the Faithful; but when the contract is dissolved, his condition is the same as that of the apostate.[5] By which is meant, that he becomes civilly dead by the junction; and that if he repent, his repentance is to be accepted, and his condition of *zimmut* revives;

[1] *Hidayah*, vol. ii., p. 801.
[2] *Ibid.*
[3] *Ibid.*, p. 807.
[4] *Ibid.*, p. 806.
[5] *Ibid.*, p. 792.

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while the protection of his family is not cancelled by the dissolution of his compact, but his *zimmeeah* wife, whom he may have left behind in the *Dar-ool-Islam*, becomes absolutely separated from him by general agreement, and his property is divided among his heirs.[1]

How far *zimmees* are subject to Moohummudan law.

Zimmees, or infidel subjects of a Mussulman Power, do not subject themselves to the laws of *Islam*, either with respect to things which are merely of a religious nature, such as fasting and prayer, or with respect to such temporal acts as—though contrary to the Moohummudan religion—may be legal by their own, such as the sale of wine or swine's flesh, because 'we' have been commanded to leave them at liberty in all things which may be deemed by them to be proper, according to the precepts of their own faith. Wherefore, with respect to all such acts, *zimmees* are on the same footing as aliens; but from these is to be excepted *zina*, or illicit intercourse between the sexes, that being held universally and by all sects to be criminal, and usury, which has been specially excepted by the Prophet himself.[2] When disputes arise between *zimmees*, which they are unable to settle among themselves, and are consequently brought for decision before the Moohummudan tribunals, it is necessary that the judge should have some certain rules for his guidance; and it is accordingly usual in legal treatises to appropriate one or two chapters or sections under the general heads of law, for exhibiting the differences between the law as applicable to Moohummudans and the *zimmees*. Hence this chapter on the marriage of infidels, and the section under the head of dower, on the dower of *zimmees* and *hurbees*.

How far foreigners residing under protection in a Mussulman country are subject to it.

Foreigners residing as *Moostamins* in the *Dar-ool-Islam*, or any Mussulman country, are presumed from accepting protection to submit themselves to the jurisdiction of the Moohummudan judge in all matters accruing subsequently to their becoming *Moostamins*, though not for anything previous thereto.[3] When a *Moostamin*

[1] *Fut. Al.*, vol. ii., p. 357. [2] *Hedaya*, vol i., p. 174.
[3] *Ibid.*, vol. ii., p. 193.

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returns to his own country, leaving deposits with *Mooslims*, or *zimmees*, or debts due by either, and is subsequently taken captive, or his country is conquered by Mussulmans and himself slain, the debts fall to the ground and his deposits escheat to the State; but if he is slain without any such conquest, or dies a natural death, both debts and deposits become the right of his heirs.[1] So, also, when a *Moostamin* dies within the Mussulman territory, leaving property in it, and heirs in his own country, the property is reserved for them until they establish their right to it; but a bequest by him in favour of a Mooslim or *zimmee* to the full amount of his estate would be valid, unless his heir had accompanied him on his entrance into the *Dar-ool-Islam*; when if the bequests should exceed a third of his property, the excess above a third would require the assent of his heir; though if his heir had not come originally with him, the bequests would be valid to the full amount of his property; and so, also, if he has no heir, or none except in the *Dar-ool-hurb*.[2] A bequest to a *Moostamin* by a *Mooslim*, or a *zimmee*,

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[1] *Hedaya*, vol. ii., p. 198.

[2] *Fut. Al.*, vol. ii., p. 335, and *Hedaya*, vol. iv., p. 1485. By articles of peace between Great Britain and the Ottoman Empire, finally confirmed by the Treaty of Peace concluded at the Dardanelles, it is (26th section) agreed, 'That in case any Englishman, or other person subject to that nation or navigating under its flag, shall happen to die in our sacred dominions, our fiscal and other persons shall not, on pretence of its not being known to whom the property belongs, interpose any opposition or violence, by taking or seizing the effects that may be found at his death, but they shall be delivered up to such Englishman, whoever he may be, to whom the deceased may have left them by his will. And should he have died intestate, the property shall be delivered up to the English consul, or his representative who may be there present; and in case there be no consul or consular representative, they shall be sequestered by the judge, in order to his delivering up the whole thereof whenever any ship shall be sent by the ambassador to receive them.' See case of Maltass *v.* Maltass, *Curteis' Reports*, vol. iii., p. 231. The treaty removes any doubt as to the validity of a bequest by a British subject to an Englishman, and in other respects seems to follow the general Moohummudan law.

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is valid; but a bequest by either of them to a foreigner not a *Moostamin* is not valid.[1]

A Mussulman is always subject to Moohummudan law.

A Mussulman is subject to the laws of *Islam* absolutely,[2] that is, without any distinction of place or otherwise. Yet if he should enter the *Dar-ool-hurb* under protection and have dealings with an enemy whereby one of them becomes indebted to the other, and he should then return to 'us,' the enemy also coming as a *Moostamin*, the judge is not to decree to either of them against the other.[3] But this is not for want of jurisdiction over the *Mooslim*, either at the time when the debt was contracted or at the time of adjudication, but because the foreigner has not made himself liable by accepting protection to the judge's jurisdiction for past transactions, and justice requires that both parties should be on an equal footing.[4] So, also, with regard to a transaction in the foreign country between two foreigners, who afterwards came out to us as *Moostamins*, or under protection. But the case would be different if they came out as *Mooslims*, or having embraced the faith; for then, both being liable to the judge's jurisdiction, he might lawfully decree in favour of one against the other.[5] The rule furnished by this case seems equally applicable to marriage, as well as to any other transactions, by a *Mooslim* in a foreign country. Whether the wife were a *Mooslimah* or *Kitabeeah*, she would, on entering the Mussulman territory under his authority, be bound to the country as following him, and the Moohummudan judge would consequently, it would seem, have jurisdiction over all transactions between them, whether previous or subsequent to their coming within his authority.[6]

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[1] *Fut. Al.*, vol. vi., pp. 141 and 205.

[2] *Kifayah*, vol. ii., p. 763.

[3] *Hidayah*, vol. ii., p. 762.

[4] *Kifayah, ibid.*

[5] *Hidayah, ibid.*

[6] Marriages occasionally take place in this country between a Mussulman and a Christian woman. Such marriages are valid according to Moohummudan law, as it is received by the Hanifite sect which prevails generally throughout India and Turkey, and most of the Moohummudan world, except Persia; but if the husband should return to the *Dar-ool-Islam*, that is, to any Mussulman country,

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Persons found within a *dar* are *primâ facie* held to belong to it.

The *dar* itself is *primâ facie* evidence that those who are found within it belong to it; but personal signs or tokens are better evidence, and proof or positive testimony still better. So that if a band of Mussulmans should capture a number of persons and bring them within the territory, and the captives should claim to be of the people of *Islam* or *zimmees*, but admit that they were taken in the *Dar-ool-hurb*, alleging, however, that they entered it as *Moostamins* for the purposes of trade or a visit, or were captives in their hands, their plea is not to be allowed; and they are to be reduced to slavery, unless they be found with the signs or tokens of *Islam* upon them, such as circumcision or the reading of the Koran and the law, and they have pleaded *Islam*, when their plea would be accepted and their reduction to slavery averted.[1]

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leaving his wife behind him in her own, a separation would take place by reason of the difference of *dar* (*post*, p. 203), which would be equivalent to a divorce (*ibid*). This, and the fact that Moohummudans are frequently married in childhood, and are allowed a plurality of wives, and may probably have left wives living in their own country, ought to render Englishwomen cautious how they enter into such connections. Among the *Sheeahs* there is some difference of opinion on the subject of these marriages, or, rather, two reports, and according to the more authentic, a perpetual marriage between a Mussulman and a Christian woman is unlawful, though there is no objection to a temporary contract, which the *Sheeah* law allows.—*Shuraya ool Islam*, p. 274.

[1] Though the Moohummudan law does not appear to recognise any distinction between domicile and country, yet as it assumes that persons residing in a *dar* different from their own have always the *animus revertendi*, it would seem that, according to it, a foreigner cannot acquire a domicile in a Mussulman country, nor a Mussulman acquire a domicile in a foreign country, until they have ceased to be subjects of their own respectively. The subject of domicile was raised in the case referred to in p. 173, but not decided, as the treaty afforded a sufficient ground for determining it. According to the decision in that case, the will of a British subject made in Turkey, to be valid, must be made in conformity with English law. See Williams on *Executors and Administrators*, vol. i., pp. 326, 327.

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Marriage of Infidels.

Marriages between *zimmees* lawful without witnesses.

Every marriage that is lawful between two *Mooslims* is lawful between two *zimmees*.[1] Marriages that are not lawful between two *Mooslims* are of several kinds. Of these there is the marriage without witnesses. When a *zimmee* marries a *zimmeeah* without witnesses, and such marriages are sanctioned by their religion, the marriage is lawful. So that if they should afterwards embrace the Mussulman faith, the marriage would still be established, according to 'our' three masters. And, in like manner, if they should not embrace that faith, but should both claim from the judge the application of the rules of *Islam*, or one of them should make such a claim, the judge is not to separate them. There is also the marriage of a woman during her *iddut* on account of another man. When a *zimmee* marries a woman in her *iddut* for another man, that man being a *Mooslim*, the marriage is invalid, and may be objected to before their adoption of the Mussulman religion, even though their own religion should recognise the legality of marriage in the state of *iddut*; but if the *iddut* were rendered incumbent on the woman on account of an infidel, and marriages in a state of *iddut* are accounted lawful in the religion of the parties, it cannot be objected to while they remain in a state of infidelity, according to general agreement. When an infidel marries a woman in her *iddut* for an infidel, and the marriage is lawful according to their persuasion, and they afterwards adopt the Mussulman faith, the marriage remains fixed and established, according to Aboo Huneefa. Aboo Yoosuf and Moohummud, however, were of a different opinion—holding that it was not fixed and established; but the saying of Aboo Huneefa is valid. And the judge is not to separate between them, according to Aboo Huneefa, though both, or only one of them, should adopt the faith; or both, or only one of

Marriage with a woman in her *iddut* for a *Mooslim* is invalid.

Otherwise when the *iddut* was for an infidel.

[1] It may, I think, be inferred that the same allowances would be made in respect of marriage to *Moostamins*, or foreigners living under protection in a Mussulman country, as to *zimmees*.

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them, should bring the matter before the judge. In the *Mubsoot* it is stated that this difference between the masters was only when the reference to the judge or the adoption of the faith takes place during the subsistence of the *iddut*; but where it does not take place till after the *iddut* has expired, the parties are not to be separated, according to all their opinions. There is next the marriage of *Mooharim*, or persons who are perpetually prohibited from intermarrying. If the wife of an infidel were unlawful to him, by being his mother or sister, for instance, is such a marriage to be accounted valid? According to Aboo Huneefa it is valid as between the parties; so that she is entitled to maintenance, and his *ihsan*,[1] or respectability, is not abated by his having intercourse with her after the contract. It is also said, however, that Aboo Huneefa accounted the marriage invalid, which was the opinion of the disciples; but the first is correct.[2] And there is the like difference of opinion with regard to a woman repudiated three times, and as to the conjoining of women who are too closely related to each other, or five women in marriage. But there are no mutual rights of inheritance between them arising out of such marriages, according to all their opinions.[3] Hence, if a *mujoosee* should marry his mother, or any other relative within the forbidden degrees, he would not inherit from her by reason of the marriage. And if both or one of the parties should adopt the Mussulman faith, they must be separated, according to general agreement. And, in like manner, when they do not adopt the Mussulman faith, but concur in bringing the matter before the judge. But if one of them only should bring the matter before the judge, and claim the

Marriage between parties who cannot lawfully intermarry.

Effect of conversion to Islam in such case.

[1] The character of being a *Moohsin*. For the exact meaning of this term, see *ante*, p. 2.

[2] Whether this applies to the opinion, or only to the report of it, does not appear.

[3] It seems difficult to account for this unanimity on the supposition that Aboo Huneefa thought the marriages to be valid; but if he thought them invalid, it would be a confirmation of the doctrine that there are no rights of inheritance under invalid marriages. See *post*, Book XI. chap. i.

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application of the rule of *Islam*, they are not to be separated when the other refuses compliance; yet, according to the disciples, they are to be separated in such a case. While they remain in infidelity, and do not bring the matter before 'our' tribunals, all are agreed that no objection is to be made to them if the marriage is sanctioned by their own religion. It is also agreed, in conformity with the saying of Aboo Huneefa, that if one should marry two sisters in a single contract, but separate from one of them before adopting the faith, and should then adopt the faith, the marriage of the remaining one would be valid and confirmed against him.

A *zimmee* cannot lawfully continue to cohabit with a thrice repudiated wife,

but may re-marry her without previous intermarriage with another. Cannot be the husband of a Mooslim woman.

When a *zimmee* has repudiated his *zimmeeah* wife three times, and then behaves to her as he had done before the repudiation, without marrying her again or saying the words of the contract over her; or when his wife has obtained a *khoolâ* or release, and he then acts to her as before without renewing the contract—they are to be separated, even though they should not bring the matter to the judge. But if he repudiates her three times, and then renews the contract of marriage with her without her being married to another, they are not to be separated.

When a *zimmee* marries a *Mooslimah*, they are to be separated; and if he should embrace the faith, and she should say, 'You married me, I being a *Mooslimah* at the time,' and he should say, 'Nay, but a *mujooseeah*,' the word is with her, and he is to be separated on her suing on the ground of the illegality.

Zimmees contracted under age have the option of puberty.

When a girl under puberty is contracted to a boy under puberty, both being *zimmees*, and they then arrive at puberty, if the contracting party was a father, they have no option; but if he were any other than a father or grandfather, they have an option, according to Aboo Huneefa and Moohummud.

Course to be followed when one

When one of two spouses embraces the Mussulman faith, *Islam*[1] is to be presented to the other, and if the other

[1] *Islam* being an act of piety, is not a ground for separation, but the obdurate rejection of it is.—*Hedaya*, vol. i., p. 178. There is an

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adopt it, good and well; if not, they are to be separated. If the party is silent and says nothing, the judge is to present *Islam* to him, time after time, till the completion of three, by way of caution. And there is no difference between a discerning youth and one who is adult; so that a separation is to be made equally on the refusal of the former as of the latter, according to Aboo Huneefa and Moohummud. But if one of the parties be young and without sufficient discernment, it is necessary to wait till he has understanding; and when he has understanding *Islam* is then to be presented to him; and if he adopt it, well; if not, a separation is to be made without waiting for his arriving at puberty. And if he be mad, *Islam* is to be presented to his parents; and if they, or one of them, should embrace it, good and well; if not, a separation is to be made between the married parties. If the husband should embrace the faith and the wife refuse, the separation is not accounted repudiation; but if the wife should embrace the faith, and the husband decline, and a separation is made in consequence, the separation is accounted a repudiation, according to Aboo Huneefa and Moohummud.[1] When a separation takes place between them by reason of refusal, and it is after consummation, she is entitled to the whole dower; and if it is before consummation, and through his refusal, she is entitled to half the dower; but if through her own refusal, she has no dower at all. If the husband of a *Kitabee* woman adopt the faith, their marriage remains unaffected.

of married parties is converted to the faith.

Different effects of conversion according as the husband or wife is the convert.

When one of the married parties adopts the Mussulman faith in a foreign country, and the parties are not *Kitabees*, or even though they should be so, yet if the woman be the person who embraces the faith, the cutting off of their marriage is suspended for the completion of three menstrual periods, whether consummation have taken

When the parties are foreigners, and conversion takes place in any foreign country.

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exception, when the husband is a convert and the wife a *Kitabeeah*, because the marriage is still lawful; see above.

[1] Because the cause of separation proceeds from him. See *post*, p. 203.

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When it takes place in the Mussulman territory.

place or not.[1] And if the other party should also adopt the faith before their completion, the marriage remains subsisting. When the parties are *Moostamins*, an absolute separation is effected between them by presenting *Islam* to the other, or by the expiration of three courses. The courses in these instances do not constitute an *iddut*; and for that reason there is no difference between an enjoyed and an unenjoyed wife; and whenever a separation takes place on this account before consummation, there is no *iddut*; nor is there any, though the separation should take place after consummation, if the woman is a *hurbee*; and even though she were a *mooslimah*, the result would still be the same, according to Aboo Huneefa. If the woman, from extreme youth or advanced age, is not subject to the courses, the separation cannot be effected except by the expiration of three months. And if the woman be the convert to *Islam*, and her husband should come out from the enemy's territory as a *moostamin*, there can be no separation, except by the completion of three courses. And in like manner, if he should become a *zimmee*, after having come out a *moostamin*; so that if his wife should afterwards follow him, *Islam* is to be presented to him; and if he adopt it, no separation is to be made between them. And so also if the husband be the convert, and the wife come out as a *zimmeeah*, there is no separation till she has had her courses three times; and if a separation take place by the completion of three courses, it is reported in the Siyur Kubeer that this is a separation by repudiation, according to Aboo Huneefa and Moohummud.

Effect of difference of religion by apostasy of one of a married pair.

Apostasy from *Islam* by one of a married pair, is a cancellation of their marriage, which takes effect immediately without requiring the decree of a judge;[2] and without being a repudiation, whether the occurrence is before or after consummation; yet if the husband be the

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[1] That is, as *Islam* cannot be formally presented for acceptance in a foreign country, the separation is effected by abstinence for three occurrences of the courses.

[2] *Doorr-ool-Mookhtar*, p. 216

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apostate, the wife is entitled to the whole dower when consummation has taken place, and half when it has not.[1] If the wife be the apostate, she is equally entitled to the whole dower in the former case, but to no part of it in the latter. If they apostatize together, and then together re-embrace the faith, the marriage remains valid on a favourable construction; but if one only of them returns to the faith a separation takes place between them. If it is not known which of them was first in apostatizing, the result is the same as if they apostatized together. If words of infidelity should fall from the wife's tongue in anger against her husband, or in order to extricate herself from the net of his authority, or to entitle herself to a dower against him by a new marriage, she becomes unlawful to her husband, but should be compelled to return to the faith, and any judge may renew the marriage at the lowest amount of dower, though so low as one *deenar*,[2] whether she dislike it or not; and she cannot marry another husband. Hindoowanee and Aboo Leeth both have said that they approved of this doctrine.

Apostasy of the husband of a Christian wife.

If a husband having a *Kitabee* wife, should become *Mooslim* and afterwards apostatize, she would be absolutely separated from him. A *Mooslim* having married a Christian they both became *Mujooses* together, and, according to Aboo Yoosuf, a separation should take place, though Moohummud was of a different opinion. But if a Christian woman, being subject to a *Mooslim*, they should both become Jews, a separation would take place between them by general agreement, because the cause of separation comes from the part of the husband specially.[3]

Effect of difference of *dar*.

A difference of *dar* is a cause of separation, though captivity is not so in itself. Hence, if one of the parties should come out from the *Dar-ool-hurb* as a *Mooslim* or

[1] As would be the case if it were a repudiation.

[2] A *deenar* is ten *dirhems*.

[3] By becoming a Jewess she would be still lawful to him, so that it is his apostasy only that makes the separation.

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zimmee to the *Dar-ool-Islam*, separation would take place. A *hurbee*, or enemy, comes out to 'us' under protection, and then accepts subjection, his wife becomes divorced[1] from him. And if one of a married pair should be taken prisoner, a separation would take place between them by reason of the difference of *dar*; but if they are taken prisoners together, no separation takes place.[2] And if a *hurbee* come out as a *moostamin*, or a *Mooslim* enters the alien country as a *moostamin*, no separation takes place between the husband and wife.[3] In like manner, the removal from a fortress of rebels to one of the just or loyal, or the contrary, does not induce separation. A *Mooslim* marries an alien *Kitabeeah* in the *dar-ool-hurb*, and then the husband comes out from it alone, his wife becomes separated from him, according to 'us'; but if the woman should come out before the husband, no separation would take place.

Case of prisoner.

If one is taken prisoner having under or subject to him (that is, as wives) two sisters, or four or five women who are taken with him, the marriage of the whole is void, according to Aboo Huneefa and Aboo Yoosuf, whether they were by separate contracts, or by one contract; but if there be in subjection to an infidel, two sisters or five women, and they embrace the faith together, and the marriages were by separate contracts, the marriage of the sister first married, or of the four first women, is valid, and the remaining one void. If he married them all by one contract, and they were *zimmeeahs*, the whole would be void, without any difference of opinion among 'us'; except that when one dies, or is separated before entering *Islam*, the marriage of the four remaining is valid; and if they were *hurbees*, or enemies, the case would be the same, according to Aboo Huneefa and Aboo Yoosuf. If two be taken prisoners with him their marriage would not be vitiated,

[1] The separation being for a cause proceeding from the husband is a *tulák* or divorce. See *post*, p. 203.

[2] Captivity alone not being a ground of separation; though it was according to the doctrine of *Shafei*.

[3] The parties being *constructively* in their own *dar*.

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but that of those remaining in the foreign country would be vitiated.[1] If a *hurbee* having married a mother and daughter, should then adopt the faith, the marriage of both would be void if he had married them by one contract; but if by separate contracts, the marriage of the first would be lawful, and that of the other void, according to Aboo Huneefa and Aboo Yoosuf. That is, when he had not consummated with either of them; but if he had consummated with both, the marriage of both would be void together by general consent; and if he had consummated with only one of the two, and the consummation had been with the first, after which he had married the second, the marriage of the first would be lawful, and that of the second void, according to general agreement. While if he had not consummated with the first, but consummated with the second, and the first were the daughter and the second the mother, the marriages of both would be void, by general agreement; but if he had married the mother first without consummation, and then married the daughter, and consummated with her, the marriage of both would be void, according to Aboo Huneefa and Aboo Yoosuf; except that it would be lawful to him to marry the daughter, but not the mother.[2]

Rule as to religion of children.

The child follows the religion of the better of its parents. Hence, if one of them be a *Mooslim* the child is of the *Mooslim* religion.[3] So, also, if one of them should embrace the *Mooslim* religion, having an infant child, the infant would become a *Mooslim* by virtue of the parent's conversion,[4] that is, when there is no difference of *dar*, by both of the parents being either within the *Dar-ool-Islam* or the *Dar-ool-hurb*, or by the child's being in the former at the time that its parent embraces the *Mooslim* faith in the foreign country, for he then becomes constructively

[1] By difference of *dar*.

[2] *Hidayah*, vol. ii., p. 804.

[3] The mother could not be so *ab initio*, for a *Mooslim* woman cannot lawfully be the wife of any other than a man of her own religion.

[4] *Hidayah*, ii., p. 113.

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one of the Mussulman people; but when the child is in the foreign country, and the parent within the Mussulman territory, and he adopts the faith there, the child does not follow him, and is not a *Mooslim*. A *Mujoosee* is worse than a *Kitabee*; and if one of the parents be a *Mujoosee* and the other *Kitabee*, the child is a *Kitabee*, and may be lawfully married by a *Mooslim*, to whom also things slaughtered by the child would be lawful.

Qualified in the case of a married female.

If a *Mooslim* marry a young girl both of whose parents are *Mooslim*, but both subsequently apostatize, the child is not separated from the husband; but if they join themselves to a foreign country, taking her with them, a separation takes place; and if one of the parents should die in 'our' country, either a *Mooslim* or an apostate, and the other should then apostatize, and take her to the foreign country, she is not separated from her husband. A Christian girl subject to a *Mooslim*, whose father becomes a *Mujoosee*, but whose mother has died a Christian, is not separated from her husband. A *Mooslim* marries a Christian girl who is contracted to him by her father, and both of whose parents are Christian; one of her parents then becomes *Mujoosee*, the other remaining Christian, the daughter does not become separated from her husband; but if both the parents should become *Mujoosees*, and the maid being still under puberty, should remain in her own religion, she would be separated from her husband, even though they should not have taken her to the foreign country, and she would have neither little nor much of the dower. And the answer would be the same if she should arrive at puberty, but in a state of fatuity, for in such circumstances she would remain subject to her parents and to the *dar* in religion; because a fatuous person cannot be of *Islam*, of himself in reality, and is therefore in this respect the same as an infant.[1] A *Mooslim* woman, having arrived at puberty, became insane (both her parents being *Mooslim*), and her father gave her in marriage, she being fatuous at the time, so that the marriage

[1] And consequently of the same *dar* with the child.

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was lawful; the parents then apostatized, and took refuge in the foreign territory;—it was held that she did not become separated from her husband. And a young girl who had once understood *Islam*, and could describe it, becoming subsequently insane was held to be in the same predicament as this person. A *Mooslim* marries a young Christian girl, both of whose parents are Christian, but who has arrived at puberty without understanding or being able to describe any religion, yet is not insane,—she is to be separated from her husband; and, in like manner, a young *Mooslimah*, when she arrives at puberty, having her senses, but not understanding *Islam*, nor able to describe it, though not insane, is to be separated from her husband. And she is not entitled to any dower before consummation, but after it she is entitled to the dower specified. And God should be mentioned to her, with all His attributes, and it should then be said to her, 'Is He so?'—whereupon, if she answer 'Yes,' she is to be judged as of *Islam*. And if she should say, 'I know Him and can describe Him,' but does not do so, she is to be separated; while if she say, 'I cannot describe Him,' opinions vary on the point. If she understand *Islam*, but does not describe it, she is not to be separated; and if she describe *mujooseeism*, she is to be separated, according to Aboo Huneefa and Moohummud, though against the opinion of Aboo Yoosuf. And this is applicable to the case of the apostasy of a youth.

Cases relating to apostates.

A man apostatizes several times, and every time returns to the faith and renews his marriage; according to Aboo Huneefa his wife is lawful to him, without being intermediately married to another husband. And the husband of a woman who apostatizes may lawfully marry four women besides her, when she has betaken herself to a foreign country. A man having married a woman is absent from her before consummation, and is then informed by a person in whom he has confidence that she has apostatized; he may give credit to the information—whether the informer be free or a slave, or even one who has undergone the *hudd* for slander—and marry four wives besides her. And in like manner, though the person be not trustworthy,

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but there is a greater probability of his being true than false in the present case; but if the probability be greater that he is lying, the man should marry no more than three. And if a woman be informed that her husband has apostatized, she may intermarry with another after the expiration of her *iddut*, according to a report which Surukhsee says is valid. If a man apostatize when so drunk as to be bereft of understanding, his wife is not separated from him, on a favourable construction.

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CHAPTER XI.

OF PARTITION.[1]

A man who has two wives must be just and impartial in his treatment of them, in matters within his power.

WHEN a man has only one wife he may be directed to be attentive to her, and to occupy the same apartment with her at times, though no exact time has been fixed by the Zahir Rewayut.[2] And when he has two wives who are free-women, he must be just and equal in dividing his attentions among them.[3] What is required of him in this respect is justice and equality in matters that are within his power, and living with them for society and acquaintanceship, not in matters that are beyond his control, such as love and matrimonial intercourse. And there is no difference between the husband who is a slave and one who is free. The healthy husband, also, and the sick, the *mujboob* and the eunuch, the impotent, the adult, and the boy verging on puberty, the *Mooslim* and the *zimmee*, in respect of partition are all alike. And with regard to wives, equality must be observed between the old and the new, the virgin and the *suyyib*, the healthy and the sick,—even the paralytic and the insane if not dangerous,—the woman in her courses, and one who is purified from them, the pregnant woman, and one in an interval of pregnancy, the young girl unfit for matrimonial converse, the pilgrim and the wife under *eela*, or *zihar*.[4] But if one

All husbands are alike in this respect;

and all wives,

except slaves.

[1] Arab, *Kusm*.

[2] *Kifayah*, vol. ii., p. 123.

[3] *Hidayah*, vol. ii., p. 122.

[4] A man's comparing his wife to the back of a female relative within the prohibited degrees, by which illegality of matrimonial intercourse is incurred until duly expiated.

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of the wives be free, whether she be a *Mooslim* or *zimmee*, and the other a slave, whether *kinn* or absolute, *mookatubah*, *moodubburah*, or *oom-i-wulud*, two days and two nights are to be given to the free-woman, for one day and one night to the slave. And slaves, or women enjoyed merely by virtue of proprietary right, have no claim to partition.

Partition of time has more particular reference to the night.

Partition has reference to the night; but a man may not have intercourse with a woman during the day unless the day be her own: and at night he ought not to enter the apartment of a wife whose night it is not by partition, though there is no objection to his going into it by day for necessary purposes, and returning to it even at night, if the woman be sick; while, if her illness is severe, he may remain with her continuously till she recover or die.

Period of remaining with each wife is left to the husband's discretion.

The measure of partition, that is, how long he is to abide with each wife, is left to the husband's discretion; for though each is entitled to an equal share, it is not in any precise manner.

A husband may be punished by the judge for not observing equality to his wives.

When the judge has enjoined partition and equality on a man, and he has evaded the order, and the matter is again brought before the judge by the wife, he should impose some punishment on the husband for doing what was forbidden, and again enjoin him to do justly. But if the man should remain with one of his wives for a whole month, whether before or after the matter is made the subject of litigation, and another wife should complain of it to the judge, he can only order equality to be observed between them for the future, and the past goes for nought, the complainant having no right to demand that her husband should remain for a like period with her. And if a man should remain with one wife for more than her proper time, with the permission of another, the other may recall the permission at any time, being in nowise bound by it.

But one wife may

So, also, if one of the wives should give up her share to her companion, it is lawful,[1] but she may retract at any time

[1] The reader will remember the case of Leah and her son's mandrakes.—Gen. ch. xxx., v. 15.

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whenever she pleases. Or if one is content to abandon her share to her companion, the act is lawful, but still she may retract. And if a man should marry two women on a condition of remaining longer with one than with the other; or if a woman should give her husband property, or take upon her something, that he may increase her share, or make some abatement from her dower with the same view, the condition and the gift would be void, and she might retract and reclaim her property. So, in like manner, if a husband should be profuse of his property to one wife, on condition of her being equally liberal of her time in favour of her companion, or one of the wives should expend her property on her companion, that she may in return abandon her time to her, the arrangement would be unlawful in either case, and the property might be reclaimed.

give up her time to another.

Conditions for inequality void, and contracts for it may berevoked.

A man going on a journey may lawfully take some of his wives with him without the others, though it would be better to cast lots between them, to prevent jealousies; and when he returns, the others have no right to require that he shall remain for a similar period with them. When a man has already one wife, he should not take another, if he have any apprehension of not being able to act justly between them both; and even though he should be under no such apprehension, it is better to abstain, and so avoid giving his wife cause for grief and vexation. It is also right and becoming to distribute all his attentions equally between his wives, even to matrimonial intercourse and kissing, and also among his slaves and *oomahat-i-wulud* (or mothers of children), though he is under *no positive* obligation to do so.

A man going on a journey may take any of his wives, without the others.

Of some Matters connected with the preceding.

It is not lawful for a husband to place two co-wives together in one habitation without their consent, from its necessarily giving occasion for disputes. And if he should do so with their consent, it is abominable to have matrimonial intercourse with one of them in the presence

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of the other. So that if he should call one of them to him for that purpose, she would not be bound to obey, nor become *nashizah* or rebellious, by refusal. On these points there is no difference of opinion. But a husband may compel his wife to wash after ceremonial defilements, and her courses and childbirth, unless she be a *zimmeeah*, and to observe other customary proprieties. Further, he may prevent her from eating things of bad odour or productive of leanness, and from the use of things of bad odour, such as green henna, in the adorning of her person; and he may beat her for neglecting to adorn herself when he desires her company, or refusing him when she is pure, or abandoning the practice of prayer and its proper conditions. When a man has a wife who does not pray, he may repudiate her, though unable to pay her dower. And if a wife have any defluxion on her, she is not to go out, whether her husband know it or not; but when there is nothing of the kind she may go out. If she have an infirm father, who has no one to remain with him, and her husband forbids her to go to him, she may disobey her husband, and obey her father, whether he be *Mooslim* or infidel. A man who has a mother still in her youth, who is in the practice of going out on occasions of festivity or sorrow, but has no husband, has no right to prevent her from going out, unless it is established to his satisfaction that she goes out for improper purposes; whereupon he may bring the matter before the judge, who may authorize him to prevent her, and then he may do so as representing the judge.

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BOOK II.

OF FOSTERAGE.[1]

Mothers and sisters by fosterage are perpetually prohibited.

It is not lawful for a man to marry his mother by fosterage, nor his sister by fosterage, by reason of the sacred text—'And your mothers who suckled you, and your sisters by sucking,' and the saying of the Prophet—'What is unlawful to you by consanguinity is unlawful to you by fosterage;'[2] and the illegality is perpetual.[3]

How the prohibition is induced.

Illegality is induced by sucking, whether it be little or much, provided that it takes place within the proper period. The little, however, must be understood as what is known to reach the stomach; and the period of sucking, according to a saying of Aboo Huneefa, is thirty months; though the disciples have said that it does not extend beyond two years. Though a child has been weaned within the period, yet if again put to the breast before its expiration, that would be sufficient to occasion the prohibition by fosterage, as the infant has been actually suckled within the period. This seems to be clear, according to 'our' doctrines and the *futwa* is stated in the Yoonabia to be in accordance with it. When the full period has expired, the illegality by fosterage is not established by sucking after it. All are agreed that the period of suckling, so as to establish a right to hire on the part of the nurse, is two years; so that when a woman who has

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[1] Arab, *Rizáa*. The word means, literally, *sucking*.

[2] *Hidayah*, vol. ii., p. 125.

[3] *Ibid.*, p. 640.

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been divorced makes a demand for the time of nursing after the expiration of two years, and the father of the child refuses to give it, he cannot be compelled to do so, but he may be compelled to pay the hire for two years.

It is established as well on the side of the man, who is the author of the milk, as of the nurse.

As the illegality by fosterage is established on the part of the mother, so also it is established on the part of the father, that is, the person by connection with whom the milk has been induced.

The foster parents and their ascendants and descendants by consanguinity or fosterage are prohibited to the child.

To the suckling, both his foster parents and their ascendants and descendants, either by natural descent or fosterage, are all prohibited; so that if his nurse should have already borne, or should thereafter bear, a child to the same or to another man, whether before the nursing or after it, or should have nursed another infant; or if the man have a child by another woman, whether before this nursing or after it, or such woman should nurse another infant on *his* milk, the whole would be brothers and sisters to the first suckling, and their children would be his nephews and nieces, and the brother and sister of the man would be his paternal uncle and aunt, and the brother and sister of the nurse would be his maternal uncle and aunt; and in like manner as to his grandfather and grandmother.

Affinity is also established by fosterage.

The illegality of affinity is also established by fosterage, so that the man's wife would be unlawful to the suckling, and the wife of the latter be unlawful to the man, and by the same analogy, in all other cases except two.

Two exceptions.

One of these is, that it is not lawful for a man to marry the sister of his son by consanguinity, while it is lawful in the case of fosterage; for the former must be either his own daughter or his step-daughter, while the latter is neither; and if a case should occur in consanguinity where the sister of a man's son is neither his own daughter nor daughter-in-law, as for instance, when a maid, the property of two persons, brings forth a child which is claimed by both, and its descent is in consequence established from each, and each master has a daughter by another woman, it would be lawful for each of them to marry the daughter of his co-owner, though the result should be that he is marrying the sister by consanguinity

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of his own son. The second case is, that it is not lawful for a man to marry the mother of his sister by consanguinity, while it is lawful in fosterage; for, in the former case, she must either be his own mother or his father's wife; and, in the latter case, this objection does not exist. The sister of one's brother by fosterage is lawful in the same way as his sister by descent would be; as, for instance, when a man's half-brother, by the father, has a sister by the mother's side, it is lawful for the man to marry her. In fosterage, the mother of one's brother, or of his paternal or maternal uncle or aunt, is lawful to him. And, in like manner, it is lawful for one to marry the mother of his nephew and the grandmother of his child by fosterage, but this is not lawful in consanguinity. So also, it is lawful to marry the aunt of one's child by fosterage, and so the mother of his son's sister, and the daughter of his child's brother, and the daughter of his child's paternal aunt. And in like manner it is lawful for a woman to marry her sister's father, son's brother, niece's father, child's grandfather, or child's maternal uncle by fosterage; though all these are unlawful when the relationship is established by descent.

To whom the milk is to be ascribed when a repudiated woman has married again.

When a man repudiates his wife, being in milk at the time, and she marries after the expiration of her *iddut* another husband, who has connection with her, all agree that if she should bear a child to the second husband, the milk is to be accounted as proceeding from him, and as being cut off from the first; and all are also agreed that when she does not become pregnant to the second husband, her milk is to be ascribed to the first; while if she be pregnant to the first, but have not yet borne a child to him, the milk, according to Aboo Huneefa, is to be accounted as proceeding from the first until she actually give birth to a child to the second.

Case of fosterage limited to the woman.

A man marries a woman who never bears him a child, but is found to be in milk and suckles an infant, fosterage is confined to the woman; so that the children of the man by another woman are not unlawful to this infant.

Where it extends to

A man commits fornication with a woman, and she bears

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the man, but not to his relatives.

him a child, and with this milk suckles a female infant, neither the man, nor any of his ancestors or descendants, can lawfully intermarry with the child. But his paternal or maternal uncle may marry the child as (they may) the child the actual fruit of the unlawful intercourse.[1]

Goes beyond him to his relatives only when the child's paternity is established.

If a man have connection with a woman under a *shoobh*, or semblance of right, and she becomes pregnant by him and suckles an infant, this infant is his son by fosterage; and in the same manner whenever the descent of a child is established from the man who has had connection with its mother, fosterage is established; and whenever the descent of a child is not established from the man who has had connection with its mother, fosterage is established only through the mother. A man marries a woman who bears him a child which she suckles, and her milk then dries up, but afterwards returns, whereupon she suckles a boy; this boy may lawfully intermarry with the man's children by any other than the woman who nursed him. If milk should appear in the breast of an unmarried virgin, and she should suckle an infant, she would be its mother by fosterage, and the rules of fosterage generally would be established between them, &c.

Fosterage established by the milk of a corpse but not of a beast,

The milk of a living and a dead person are alike in establishing illegality by fosterage. When two infants are suckled by the milk of a beast, fosterage is not established. Sucking in the Mooslim territory and in a foreign country are alike; so that when it has taken place in the latter, and the parties embrace the faith or come into the Mooslim territory, the rules of fosterage are established between them. And as fosterage takes place by imbibing from the teat, so also it is induced when the milk is poured out or administered medicinally. But not when poured into the ear or other cavities of the body, or even administered as a clyster, though in some cases it should reach the brain or the stomach; but, according to Mohummud, it is established when administered by a clyster. The former, however, is in accordance with the Zahir Rewayut.

nor by milk administered in a clyster.

[1] Because the paternity of the child is not established.

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Case of a woman's milk mixed with other substances.

When milk is mixed with food and touched by the fire, that is, subjected to its action, and the food is cooked, its character is changed, and no illegality is incurred, whether the milk or the food preponderates, and though the milk has not been touched by the fire, yet, unless the milk preponderates, illegality is not established; and even though it should preponderate, the result would still be the same, according to Aboo Huneefa, because when a liquid is mixed with a solid the liquid follows the solid, and passes from its own character of being a drinkable. If human milk be mixed with the milk of a goat, and the former preponderates, illegality is established; so also, though bread be crumbled in a woman's milk, and the bread soaks up the milk, or though meal be mixed with the milk, yet if the flavour of the milk be found in it illegality is established; that is, whether the food be taken mouthful by mouthful, or swallowed at once, illegality is established. And if the milk of a woman be mixed with water, or medicine, or the milk of a beast, regard is to be had to that which preponderates. And the case is the same with every other liquid or solid. The test of preponderance is the perception of flavour, colour, and smell, or of one of these things. And if the substances be equal, illegality is established for want of preponderance over the milk.

Or with the milk of another woman.

When the milks of two women are mixed together, illegality is established, according to Aboo Yoosuf, on the side of that woman whose milk preponderates; but, according to Moohummud, with regard to both the women, however the mixture may be made; and there is one report, as from Aboo Huneefa, to that effect, the Zahir Rewayut being also in its favour. It is further recommended as being more cautious; and in one authority, the opinion of Moohummud is said to be correct. When the milk is churned, or thickened, or made into a confection, or cheese, or *ariel* (that is, dried and powdered), or into whey, and the child is fed with it, illegality is not established, for the term sucking is inapplicable in such a case.

Indiscriminate

It is not proper for women to suckle any child indis-

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nursing objectionable.

criminately, and when they do suckle they should take care to remember or write down the particular child.

An infant wife is rendered unlawful to her husband by being suckled by his near relative.

If a man should marry a young child, and the husband's natural or foster mother, or his sister, or daughter, should come and give suck to the child, she would become unlawful to him, and he would be liable to her for half the dower; for which, however, he might have recourse against the nurse if she had done the mischief intentionally, but if it were not intentional he would have no claim against her.

So also two or more infant wives when suckled by a stranger.

And if a man should marry two children at the breast, and a strange woman should suckle them both together, or one after the other, both would become unlawful to him; but he might remarry either of them at his pleasure; and if there were three, and the woman should suckle them together, they would all become unlawful to him, but he might remarry whichever of them he pleased; but if she had suckled them in succession, one after the other, the two first only would be unlawful to him, while the third would remain his wife; and in like manner if she should suckle two of them together, and then the third, the two first would become unlawful, and the third remain his wife; but if one were suckled first, and then the other two together, the whole would become unlawful. The husband in all the cases would be liable to each of the children for half her dower; for which, however, he might have recourse against the nurse if she did the mischief intentionally. If there were four girls, and the woman should nurse them together, or one after another, the marriage of all would be vitiated. And, in like manner, if she should nurse one and then the three together, they would all become unlawful. But if three were nursed together, and then the fourth, the fourth would not be rendered unlawful.

Case of an infant wife being suckled by a co-wife who is adult.

When a man has married a child and an adult woman, and the latter gives suck to the former, both of them become unlawful to their husband; and the adult woman, if he never had connection with her, has no right to dower; but the child is entitled to it, and the husband has a right of recourse against the adult for whatever he has to pay to the child, if the mischief was intended;

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while, if it was not intended, she is not liable for anything, even though she knew that the child was his wife. If, in addition to the knowledge of the marriage, she were also aware that it would be vitiated by her suckling the child, her intention to do the injury would be inferred, unless her object were the allaying of hunger or saving the child's life. If, when apprehensive on account of it, she did not know the marriage; or, knowing it, was not aware that her act would vitiate it; or, knowing this fact, she was apprehensive for the child's life, or meant only to allay its hunger, the husband could have no claim against her; and her word is to be received with her oath. Neither would he have any remedy against the grown woman if she were insane, or acted under compulsion. Or if the child should come to her, being hungry, and should seize the teat and suck her, she forbidding; and, in this case, each would be entitled to half her dower, the husband having no right of recourse against either of them. Then, as to the grown woman, she is rendered unlawful for ever to her husband; and so also the child, if connection had taken place with the mother, or the milk had proceeded from the man; and it is not even lawful for him to marry her a second time.

Or by the mother of the co-wife.

A man has two wives, one a child and the other a grown woman, and the mother of the latter suckles the former; both the wives become absolutely separated from him; and the result would be the same if the child were suckled by the sister of the grown woman. But if the paternal or maternal aunt of the grown woman should suckle the child, neither of them would become absolutely separated. A man has connection with a woman under an invalid marriage, and then marries a girl who is suckled by the mother of the former woman, the girl becomes absolutely separated.

Case of two infant wives being suckled by a co-wife.

If a man should marry a grown woman and two girls, and the grown woman should suckle them both together, they would all become prohibited to him, and he could never lawfully marry the grown woman, nor ever lawfully conjoin the two girls in marriage, but he might lawfully

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marry one of them, unless he had connection with the grown woman; while if he had such connection he could never lawfully do so, just as in a case of descent.

Case of an infant wife suckled after repudiation.

If a man, having married a child, should repudiate her, and then intermarry with a grown woman, and the woman should suckle the child—it matters not whether the milk be of the same man or another—the woman would be rendered unlawful to him, having now become the mother of his wife. And if a man should repudiate his wife three times, and she should then, before the expiration of her *iddut*, suckle another wife of his who is an infant, the infant would be separated from him because she has become the foster daughter of the other, and a conjunction has taken place during the subsistence of the *iddut*; a conjunction in such circumstances having the same effect as a conjunction during the subsistence of marriage. The result would be the same if her sister should nurse the infant wife of the man, and the infant would be separated.

Or of an *oom-i-wulud* suckling her infant husband.

When a man has given his *oom-i-wulud* in marriage to his slave, being a child, and she has suckled the child with her master's milk, she becomes unlawful to her master and to her husband also. A man, having an *oom-i-wulud*, marries her to a boy, and then emancipates her, whereupon she separates herself from her husband under the option of emancipation, and marries another, to whom she bears a child, after all which she comes to the boy and suckles him; she is, in consequence, separated from her husband, because she was the wife of one who has now become her son by fosterage.

Fosterage is established by declaration or by proof. What proof required.

Fosterage is made manifest or established in two ways, viz. either by acknowledgment or by proof; and no proof is received except the testimony of two men, or one man and two women, all of whom must be just persons. Further, no separation can be made on account of fosterage except by order of the judge. But when attestation is made to a woman after her marriage by two men or by one man and two women, being just persons, she ought not to remain with her husband, as their attestation would be sufficient to establish the fosterage before the judge.

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Declaration of fosterage by a man when and how it may be retracted.

When a man has married a woman, and then said after the marriage, 'She is my sister by fosterage' or the like, but afterwards retracted by saying, 'I made a mistake; the fact is not as I stated,' the parties are not to be separated, on a favourable construction; while if the first words were established against him, and he should say, 'What I said is true,' they ought to be separated, and any subsequent denial would be of no avail to him. If the woman assents to his first statement, she has no right to dower; but if she denies it, she is entitled to half the dower; and if consummation have taken place, she is entitled in the former case to whichever is the less of the named or the proper dower, and in the latter to the full dower, besides maintenance and lodging. If the declaration were made before marriage, all the circumstances being the same, and the man were to retract, he might lawfully marry the woman; but not so if he had confirmed the statement, for in that case the marriage would be unlawful, and the parties must be separated, without regard to any subsequent denial by the husband.

Similar declaration by a woman.

When a woman has declared with reference to a particular man, 'This is my son, or brother, or nephew, by fosterage,' but the man has denied it, and the woman has then given herself the lie by saying, 'I was mistaken,' after which a marriage takes place between them, it is quite lawful. So also if the marriage should intervene before she has given herself the lie, and even though she should have said after the marriage, 'I declared before marriage that you were my brother by fosterage, and what I declared was true at the time of the declaration, and the marriage is invalid,' still the parties are not to be separated; while if this were said by the husband, they must be separated. And if they had both made such a declaration, and then concurred in giving themselves the lie, saying, 'We were mistaken,' and should then marry, the marriage would be lawful.

Declaration of descent may be

If a man should make a declaration of descent or consanguinity, by saying, 'This is my sister,' or, 'my mother,' or 'my daughter,' by descent, and the party

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similarly retracted.

referred to has no known descent, their respective ages also admitting of the relation of parent and child, and the question is then put to him a second time, whereupon he says, 'I was mistaken,' or 'in error,' they would still continue married to each other, on a favourable construction of the law. But if he should repeat, 'The fact is as I stated,' a separation must be made between them. When, however, the respective ages do not admit of the parties being in the relation to each other of parent and child, the descent is not established, and the parties are not to be separated. And if a man should say to his wife, 'This is my daughter,' she being of known descent, or, 'This is my mother,' he having a known mother, there would be no separation.

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BOOK III.

OF DIVORCE.

Thirteen kinds of separation or divorce between married parties.

THERE are thirteen different kinds of *firkut*, or separation of married parties, of which seven require a judicial decree, and six do not. The former are separations for *jub* and impotence, and separations under the option of puberty, or for inequality, or insufficient dower, or a husband's refusal of *Islam*, or by reason of *Lián*, or imprecation. The latter are separations under the option of emancipation, or for *eela*, apostasy, or difference of *dar*, or by reason of property (that is, one of the parties being the owner of the other), or a marriage being invalid.[1] As a consequence of the first seven causes of separation requiring a judicial decree, it follows that effect cannot be given to them in the husband's absence, since a decree cannot be passed against an absent person.[2]

Separation for causes originating in the husband are termed *tulák*.

Every separation of a wife from her husband for a cause not originating in him, such as the option of puberty or emancipation, is a cancellation of the marriage contract; and every separation for a cause originating in the husband, such as *eela*, *jub*, and impotence, is a TULÁK.[3] Separation for a husband's apostasy appears to be an exception to this rule, for it is a cancellation; but the apostasy does not make the cancellation; it merely nullifies the husband's right, and with it the legality of conjugal intercourse.[4]

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[1] *Ashbaho wa al Nuzair*, p. 250.
[2] *Ibid.*
[3] *Ibid.*, Commentary.
[4] *Ibid.*, and see *ante*, p. 182.

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The term is also used in a more restricted sense.

Tulák, as explained in the dictionaries, is the taking off of any tie or restraint; in the language of law it is the taking off of the marriage tie by appropriate words.[1]

There are thus two senses in which the term is used by Moohummudan lawyers, one of which comprehends the other. In the more comprehensive sense, it is the title of a *Kitab*, or book, which comprises all the separations of a wife from her husband for causes originating in him. In the less comprehensive sense, it is restricted to that kind of separation, or release from the marriage tie, which is effected by the use of certain appropriate words by the husband. To distinguish the two senses in which the term is employed, I render the more comprehensive sense by the word 'Divorce,' and the more restricted sense by the word 'Repudiation;'—though I am sometimes obliged to use the former word in its common acceptation, of any dissolution of the marriage tie.

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[1] *Inayah*, vol. ii. p. 211.

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CHAPTER I.

DEFINITION, CONSTITUTION, CONDITIONS, LEGAL EFFECT, AND DIFFERENT KINDS OF REPUDIATION; AND WHOSE REPUDIATION IS EFFECTUAL, AND WHOSE IS NOT.

Definition.

REPUDIATION, or *Tulák* as the term is defined in law, is a release from the marriage tie, either immediately or eventually, by the use of special words. It was originally forbidden and is still disapproved, but has been permitted for the avoidance of greater evils.

Constitution.

Its pillar is the expression, 'Thou art repudiated,' or the like; and it is subject to two special conditions.

Special conditions.

First, there must be an actual tie on the woman, either of marriage or of *iddut*. Second, she must still be legally capable of being the subject of the marriage. Hence, if a woman should become unlawful to her husband by means of supervenient affinity, after consummation, and it should in consequence become incumbent on her to separate from him, and to observe an *iddut*, and he should then repudiate her while the *iddut* is still subsisting, the repudiation would not take effect.

Effect.

Repudiation is either revocable (*Rujâee*) or irrevocable (*Báin*); and its effect is a total separation or divorce between the parties, on the completion of the *iddut* when it is revocable, and without such completion when it is irrevocable. Further, when repudiations amount to three, they present an obstacle to the re-marriage of the parties with each other.

Two forms:

There are two forms of repudiation; one termed *Soon-*

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nee, or that which is agreeable to the Sonnah or traditions, and the other termed *Budâee*, or that which is new or irregular; each being of two kinds, one kind that has reference to number and the other that has reference to time. The *Soonnee* form of repudiation, or that which is conformable to the traditions in number and time, is of two kinds; the *Ahsun* or best, and the *Husun* or good. The *Ahsun*, or best, is when a man gives his wife one revocable repudiation in a *toohr*, or period of purity (that is, between two occurrences of the courses), during which he has had no sexual intercourse with her, and then leaves her for the completion of her *iddut*, or the birth of her child if she happens to be pregnant; whereupon the repudiation, unless revoked in the meantime, becomes complete, or in other words a divorce. The *Husun*, or good, is when he gives her one repudiation in a *toohr*, or period of purity, in which he has had no sexual intercourse with her, and then gives her another repudiation in the next *toohr*, and a third in the *toohr* after that. The third being irrevocable[1] completes the divorce, without waiting for the expiration of the *iddut*, or delivery if she happens to be pregnant. When the woman is a slave the divorce is completed by two repudiations, whether the husband be a slave or free.[2]

Soonnee form,

of two kinds:

Ahsun or best,

and *Husun*, or good.

To render the *toohr*, or period of purity in which there has been no sexual intercourse, a fit time for repudiation in the *soonnee* form, there must have been no such intercourse, nor any repudiation, during the courses immediately preceding it; either of which would render the following *toohr* altogether unfit for that purpose.

The time when repudiation in the *soonnee* form should be given.

Adherence to number is required by the *soonnee* form of repudiation, both with respect to the enjoyed and unenjoyed wife, who are here on the same footing; but adherence to time is required only in the case of the enjoyed wife; and one who is unenjoyed may be repudiated according to that

Distinction between the enjoyed and unenjoyed wife in this respect.

[1] It is only after one or two repudiations that a wife can be retained (see *post*, p. 285); and three must, therefore, be irrevocable. *See* also p. 220.

[2] *Hidayah*, vol. ii. p. 153.

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form at any time, either in a *toohr*, or during the actual occurrence of the courses. A wife with whom a valid retirement has taken place is in this respect on the same footing as one whose marriage has been consummated.[1] A *Mooslim* and a *Kitabee* woman, and a slave, are all alike as to the proper time of a *soonnee* repudiation.

Budâee form.

The BUDÂEE, or new and irregular form of repudiation, is of two kinds: one, where the innovation is in respect of number, and the other, where it is in respect of time. The former is, when a man repudiates his wife three times in one *toohr*, either in a single sentence or in different sentences, or joins two repudiations in one *toohr* in a single sentence, or in different sentences. When he does this, the repudiation takes place, but he is sinful for so doing. The other kind of BUDÂEE, or new repudiation, and which is so in respect of time, is when a man repudiates an enjoyed wife who is subject to the monthly courses, either at a time when they are actually on her, or during a *toohr*, in which there has been sexual intercourse between them. Such a repudiation is also effective, but it ought to be revoked, or, more correctly speaking, revocation is incumbent on the husband. This kind of BUDÂEE repudiation is necessarily restricted to an enjoyed wife, because one who has not been enjoyed may be repudiated by the *soonnee* form without any reference to time. In the first of the *Budâee* forms the repudiations become a complete divorce as soon as they amount to three; in the second, the repudiation does not become divorce until the completion of the *iddut*. According to the Zahir Rewayut no repudiation that is *báin*, or irrevocable in the first instance, can be agreeable to the Sonnah.

How the *soonnee* form is applied to a woman not subject to the courses.

When a woman, by reason of extreme youth or age, or some morbid obstruction, is not subject to the courses, and her husband is desirous of repudiating her according to the Sonnah, he should give her one repudiation, and then another after the lapse of a month, and a third after the lapse of another month. If the first is given at the

[1] See *ante*, p. 101.

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beginniag of the month; that is, the night of the first appearance of the new moon, the months are to be determined by the subsequent appearances of the new moon, both for repeating the repudiation, and also for reckoning the *iddut*, according to general agreement. But if the first repudiation is given in the middle of the month, the time for its repetition is to be reckoned by days, and the second repudiation to be given on the thirty-first day (not on the thirtieth) after the first; and so with regard to the next; and the *iddut* is in like manner to be reckoned by days, according to Aboo Huneefa and one report of Aboo Yoosuf. So that it is not completed till after the expiration of ninety days. It is also to be observed that a husband may lawfully repudiate a wife, who, either from extreme youth or age, is not subject to the courses, immediately after carnal intercourse; that is, without any time intervening between it and the repudiation. A pregnant woman may also be repudiated immediately after such intercourse, and three times according to the Sonnah, by observing the interval of a month between the repetitions.

Whose Repudiation is Effectual and whose is not.

Any husband who is sane and adult may repudiate his wife.

Repudiation by any husband who is sane and adult is effective,[1] whether he be free or a slave, willing, or acting under compulsion; and even though it were uttered in sport or jest, or by a mere slip of the tongue, instead of another word. And if a person, meaning to say 'Zeinub,' 'thou art repudiated,' should, by a slip of the tongue, say, 'Amrut' instead, the person actually named would be repudiated as before the judge, though, in a question between the man and his God, the repudiation would apply to neither. When a man says to his wife—'Thou art repudiated,' without knowing the meaning of the words, or so much as what is implied by repudiation, still the words are effective, and the woman is repudiated judicially, though, in a religious point of view, there is no repudiation.

[1] This is founded on a saying of the Prophet that 'Every *tulák* is lawful, except that of a boy or a lunatic.' *Hidayah*, vol. ii. p. 149.

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Repudiation by a youth under puberty, though possessed of understanding, is not effective; and that by a person who is insane, or asleep, or affected by pleurisy, or in a faint, or overcome by astonishment, is in the same predicament. So also repudiation by a lunatic with lucid intervals, if pronounced while a fit is upon him, is ineffectual; but when given in a lucid interval, it is valid. And if a person should repudiate his wife in his sleep, and on waking should say to her, 'I repudiated thee in my sleep,' or, 'I have allowed that repudiation,' still it would not take effect.

But a youth under puberty cannot repudiate.

If a youth under puberty should repudiate his wife, or another person should do so on his behalf, and the youth, after arriving at maturity, should allow what was done while he was a minor, the allowance, to have any effect, must be couched in terms expressive of a new repudiation, rather than a confirmation of the old one. Thus, if he should say—'I have allowed it,' no repudiation would take place; But if he should say—'I have made it to happen,' that would be sufficient to effect it *de novo*.

And mere approval, after he has arrived at majority, of a repudiation given before it, is not sufficient.

Repudiation by a drunken man, when the intoxication has been produced by grape or date wine, is effective according to 'our' doctrine, unless the drinking be against his will, or for a necessary purpose; when, if he should become intoxicated and repudiate his wife, though there is some difference of opinion, yet, according to the more correct view, as he would not be liable to the *hudd*, or specific punishment for drunkenness, in such a case, so neither should repudiation, or any another *tusurroof* (or disposing act) done by him in that state, be effective. Repudiation by one drunk of henbane is effective, and the person himself is held to be liable to the *hudd*, on account of the prevalence of the vice in 'our' times, and the *futwa* is in accordance with this view. With regard to the various kinds of liquor extracted from grain and honey, though, according to Aboo Huneefa and Aboo Yoosuf, repudiation by a man intoxicated on them would not be effective, yet Moohummud held differently, and the *futwa* is in accordance with his opinion.

In what cases repudiation by a drunken man is or is not effective.

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Distinction between a compulsory repudiation, and a compulsory acknowledgment of one.

A compulsory acknowledgment of repudiation is not valid; though as already said, repudiation itself under compulsion is so. The sultan compels a man to appoint an attorney to repudiate his wife, and for fear of beating and imprisonment, he says, 'You are my attorney,' without further addition; whereupon the attorney gives the repudiation, but the principal afterwards alleges, 'I did not appoint him to repudiate my wife.' It has been said that this plea cannot be listened to, and that the repudiation is effective.

Repudiation by a dumb man is effective;

Repudiation by a dumb man by signs is effective, when the dumbness has been long continued, and his signs have become well understood; and it makes no difference whether he can write or not. Where the dumbness is supervenient to birth, and has not been of long continuance, no regard is paid to his signs; when short of three, the repudiation is *Rujâee* or revocable. Repudiation by a dumb man in writing is also lawful.

but not by an apostate,

Repudiation by a husband who has apostatized from the Moohummudan religion, and joined himself to the *Dar ool Hurb* or a foreign country, is without effect, but would become effective if he should return to the territory while his wife is still in her *iddut*; and in the case of a wife who apostatizes and joins herself to a foreign country, repudiation by her husband would not take effect upon her; not even though she should return before her courses, according to Aboo Huneefa; but Aboo Yoosuf held in that case that it would.

nor by one who has become the owner or slave of his wife,

unless emancipation first takes place.

If a person should buy his wife and then repudiate her, the repudiation would have no effect. So also, if a woman should become the owner of her husband, and he should then repudiate her, the repudiation would be without effect. But if a woman should purchase her husband and emancipate him, and he should then repudiate her, the repudiation would be effective; and in like manner, if a husband, after purchasing his wife, should emancipate and then repudiate her while she is still in her *iddut*, the repudiation would take effect, by reason of the removal of the impediment.

The wife of a slave

When a slave has married a woman and repudiates

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her, his repudiation is effective; but his master's would not be so.

cannot be repudiated by his master.

Repudiation has regard to the condition of the woman; so that if she be a slave, the full number of repudiations is two, whether her husband be a slave or free; and if she be free the full number is three, whether her husband be free or a slave.

Condition of wife regulates the number of repudiations.

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CHAPTER II.

HOW REPUDIATION IS EFFECTED.

Two kinds of words, *sureeh* and *kinayát*.

THE words by which repudiation may be effected are of two kinds; *sureeh* or plain, and *kinayát* or ambiguous. The former are sufficient of themselves, the latter require intention.

Repudiation may be either of the present time, or be referred to the future; and it may be with or without comparison, or description, and may be pronounced either before or after consummation. It may also be in writing and in a different language from the Arabic. This chapter, therefore, is divided into the following sections:—1st. Of *sureeh* or express repudiation. 2nd. Of *izafut* or the reference of repudiation to a future time, and matters connected therewith. 3rd. Of comparing repudiation to something, or describing it. 4th. Of repudiating before consummation. 5th. Of *kinayát* or ambiguous expressions. 6th. Of repudiation by writing; and 7th. Of repudiation in the Persian language.

SECTION FIRST.

Of Sureeh or Express Repudiation.

Sureeh, or express words and their effect when addressed directly to the wife.

Express repudiation is effected by the words, 'Thou art repudiated,' or, 'I have repudiated;' by which only one revocable repudiation is induced, though the husband should intend more, or intend that it should be irrevocable, or have no particular intention in making use of the expressions. And if he should allege that by the words

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Thou art repudiated,' he meant nothing more than a release from bondage, the plea is not to be admitted judicially, though it is different as between him and his God; but as to the wife, it is material to observe that she is in the same position as the judge, and cannot lawfully admit the embraces of her husband when she has either heard the words herself, or they have been communicated to her by a trustworthy witness.

When addressed to her indirectly.

If a man, in addressing his wife, should say, 'O repudiated,' and she were never married before, or, if married before, had not been repudiated by her husband, the words would be one repudiation; and even though she had been previously married and repudiated, the repudiation would still be effective, unless he could allege that he merely meant to announce the fact; in which case the plea would be good in conscience, and though there are different reports on the subject, the most authentic is in favour of its being received in law; but if he should say that he used the word in contumely, though the plea might still be good in conscience, it would certainly not be so in law.

Their effect when repeated.

If a man should say to his wife, 'Thou art repudiated, repudiated,' or 'Thou art repudiated, thou art repudiated,' or 'I have repudiated thee, I have repudiated thee,' or should say, 'Thou art repudiated, and I have repudiated thee,' two repudiations would take place if she were an enjoyed wife; and though he should say, 'I intended by the second expression only information of the fact,' no credit could be given to his allegation in law, though it would be good as a matter between him and his conscience. When a man has said to his wife, 'Thou art repudiated, and repudiated, and repudiated,' without suspending it on a condition, she is repudiated three times if an enjoyed wife and once if unenjoyed; so also if the connective, instead of being *wa* (and), as in the last case, were *fa* or *thoom* (then); or the word 'repudiated' were repeated without either. A man having said to his wife, 'Thou art repudiated, thou art repudiated, thou art repudiated,' then says, 'I intended repudiated by the first word, and explanation by

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the second and third,' he is to be believed in a religious point of view, yet still judicially she is repudiated three times. And whenever the word *tulák* is repeated, whether with or without the connective *wa* (and), a repudiation is to be counted; and if the husband should allege that he meant by the second no more than the first, he is not to be credited judicially; as, for instance, when he says, 'O repudiated, thou art repudiated,' or 'I have repudiated thee, thou art repudiated.' But if he should make use of the explanatory particle, *fa* (then), the second repudiation would not take place without intention; as, for instance, when he says, 'I have repudiated thee, *fa*, thou art repudiated.'[1]

When given in answer to a repeated request of the wife.

A woman says to her husband, 'Repudiate me, and repudiate me, and repudiate me,' and the husband says, 'I have repudiated thee,' this amounts to three repudiations, whether he mean three or not; but if she had used the same expressions, without the connective *wa* (and), as 'Repudiate me, repudiate me, repudiate me,' and the husband had answered, 'I have repudiated thee,' there would be three repudiations if he intended three, and only one if he intended one or had no particular intention. If she should say, 'Repudiate me thrice,' and he should answer, 'Thou art repudiated,' or 'Then thou art repudiated,' there would be only one repudiation; but if the answer were, 'I have repudiated thee,' it would amount to three. A woman says to her husband, 'Repudiate me,' and he answers, 'Thou art not my wife,' it has been said that this effects a repudiation without the necessity of intention. A woman says to her husband, 'Repudiate me,' and he answers, 'Thou art single,' she is repudiated once.

When in answer to a question by a third party.

A person says to a man—'Have you not repudiated your wife?' and he answers, 'True' (*bula*),—she is repudiated,

[1] The difference between this and the other case in which this particle is introduced seems to be that there the word is repeated three times, which would make an irrevocable divorce, while here it is repeated only twice, which leaves room for revocation. See also *post*, p. 246.

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just as if he had said, 'I have repudiated;' for that is an answer to the question in the affirmative; but if he had said, 'Yes' (*naâm*), there would be no repudiation, for that is an answer to the question in the negative.

When referred to a class of women including his wife.

If a man should say, 'The wives of the people of the world, or of Rei, are repudiated,' he himself being an inhabitant of Rei, his wife would not be repudiated; unless he intended that she should be so, and it would make no difference whether he say 'all' or not. But with regard to the words 'wives of the people of the street,' or the 'mansion,' he being one of them, or 'the women of this house,' his wife being in it,—she would be repudiated. So also if his words were, 'The women of this city or village are repudiated, and his wife is in it, she would in like manner be repudiated.

When applied to a wife by name, who is absent,

When a man has said that his wife Zeinub is repudiated, and she sues him before the judge for a divorce, whereupon he says, 'I have another wife of the same name in such a city, to whom I intended the repudiation to apply, but does not produce evidence of the fact, the judge should decree for a divorce to the woman, yet still if the man should subsequently produce the other wife having the name of Zeinub, and the judge should be satisfied of the fact, he would have to make the repudiation applicable to her, and to reverse the former decree (even though he had decreed it to be irrevocable), and to restore the former wife to her husband. So also, if a man should say 'his wife is repudiated,' he having a known wife at the time, and another woman should claim to be his wife, he assenting, the result would be the same. But if a man, having married two wives of the same name, one by a valid and the other by an invalid contract, should say, 'Such an one is repudiated,' and afterwards allege that he meant the repudiation to apply to the wife who was married by the invalid contract, his allegation could not be admitted judicially. And in like manner, if he had said, 'One of my two wives is repudiated,' and then added—'I intended her whose marriage is invalid,' the allegation could not be admitted judicially.

or to a wife generally when the husband has more wives than one.

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Commission to a wife to repudiate herself.

A man has said to his wife, 'Take thy *tulák*,' and she has said, 'I have taken,'—she is repudiated even without intention on his part. So also if he should say, 'The High God has repudiated thee,' she would be repudiated without intention. And this is correct. A man says to his wife, 'I have given to thee to repudiate thyself;'—this is a commission to repudiate herself, and if she do so at the meeting, repudiation takes effect, but otherwise not. When a man has said to his wife, 'I have given to thee thy *tulák*, this is express, so that repudiation takes effect judicially, even though he should not have intended it; and if he should say, 'I meant that *tulák* should be in your hands,' he is not to be listened to judicially, though he is to be credited in a religious point of view. But if his words were, 'I have abandoned to thee thy *tulák*, though she would be repudiated if he intended it, yet if he should say, 'I did not intend repudiation,' he is to be credited judicially.

When applied to a particular part of the person,

When repudiation is applied to the whole of a woman's person, or to what is usually considered as implying the whole, it takes effect; as when a husband has said, 'Thou art repudiated,' or 'thy neck,' or 'soul,' or 'body,' or 'head,' or 'face,' is repudiated. So also, 'thy mind.' But when applied to a part which is not usually considered to imply the whole person, repudiation does not take effect. As if one were to say, 'Thy hand, or foot, or finger, is repudiated,' unless the whole body were intended; but if one should say, 'Thy hand is repudiated,' meaning thereby the whole body, repudiation would take effect. So also if he should say, 'Thy navel,' thy 'tongue,' or 'nose,' or 'ear,' or 'leg,' or 'thigh.'

or to a distributive share.

If the repudiation be applied to a distributive part; as, if one should say, 'Thy half,' or 'third,' or 'fourth,' or 'one of thy thousand parts, is repudiated,' it takes effect.

When half a repudiation or one or more halves of it are given.

If one should say, 'Thou art repudiated half a repudiating,' one full repudiation would take effect; and though he should say, 'Two halves of one repudiating,' still there would be only one. But 'three halves of a repudiating' would amount to two repudiations; and so

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also 'four halves of one.' And if he were to say, 'Thou art repudiated half of two repudiatings,' one repudiation would take effect; while 'two halves of two repudiatings would amount to two, and 'three halves of two repudiatings' would amount to three. And if he should say, 'Thou art repudiated half of a repudiating, and a third of a repudiating, and a sixth of a repudiating,' three repudiations would take effect; for each part is referred to an undefined repudiating, and whenever an indefinite noun is repeated, it is held to apply to a new individual, not to that which has been already mentioned. But if he were to say 'half of a repudiating, and a third of it, and a sixth of it,' only one repudiation would take effect, unless the sum total of the parts should exceed one whole; as, for instance, if it were said, 'Thou art repudiated half a repudiating, and a third of it, and a fourth of it,' when, though it has been said that there would still be but one repudiation, the more approved and the correct view is that there would be two.

Of associating one woman in the repudiation of another.

If a man should repudiate his wife once, and then say to another, 'I have associated thee in her repudiation,' the other would be repudiated once; but if he should then say to a third, 'I have associated thee in their repudiations,' she would be repudiated twice, and if he should repeat the expression to a fourth, she would be repudiated three times. If, however, the repudiation of the first were for a consideration in property, the second would not become liable for any similar consideration, unless he were to say, 'I have associated you with her for so much of the property;' when if she chose to accept the repudiation, she would be liable, but not otherwise. If one should say, 'Such an one is repudiated thrice, and such an one with her,' or 'I have associated such an one with her in repudiation,' they would be thrice repudiated. And if a man should say to three of his wives, 'You are repudiated three times,' or 'thrice,' there would be no division of the repudiations between them, but each wife would be thrice repudiated, contrary to the case of his saying, 'I have made three between you,' when there would be

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a division, and only one repudiation would take effect upon each.

An option cannot be reserved in repudiation.

Repudiation cannot be qualified by an option. Thus, a person says to his wife, 'Thou art repudiated, and I have an option for three days,' repudiation takes place, and the option is void.

Effect of limiting tion to a particular

If a person should say, 'Thou art repudiated till night,' or 'till a month,' or 'till a year,' the expression may be considered in three different ways. He may have intended repudiation to take place immediately, and have specified the time for the purpose of prolongation, and in that case the repudiation would take effect on the instant. Or he may have intended the repudiation to take effect after the expiration of the time referred to, and in that case the repudiation would so take effect. Or he may have had no particular intention, in which case the repudiation would not take effect till after the expiration of the time.

or place.

If one should say, 'Thou art repudiated from here to Syria,' that would be one repudiation, and he would have the power to revoke it. And if he should say, 'Thou art repudiated at Mecca,' or 'in Mecca,' she would be repudiated on the instant in every country. So also if he should say, 'Thou art repudiated in the mansion.' And if he should allege that he meant on her coming to Mecca, though the allegation might be good as a matter between him and his conscience, it could not be admitted judicially. But if he should say, 'Thou art repudiated when thou hast entered Mecca,' she would not be repudiated till her entrance into it; and if the words were 'on thy entrance into the house,' the repudiation would be dependent upon that event.

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Section Second.

Of Izafut,[1] *or the reference of Repudiation to a future time; and of matters connected therewith.*

Repudiation is said to be referred to a time when its effect is postponed from the time of speaking to some future time specified, without a word of condition.[2] And repudiation is said to be suspended on or attached to a condition when it is combined with a condition and made contingent on its occurrence.[3] In the former case repudiation takes effect immediately on the arrival of the time to which it has been referred; in the latter it takes effect on the occurrence of the event on which it has been made to depend. And revocable as well as irrevocable repudiations are susceptible of being referred to a time, or made subject to a condition. The two kinds of *Izafut*, or reference to a future time with or without a condition, might therefore, I think, be treated together; but as they have been treated separately by the compilers of the *Futawa Alumgeeree* and other writers on the Moohummudan law, I follow the same arrangement.

When repudiation is referred to a time it takes effect at the commencement of the time.

When a man has said, 'Thou art repudiated in the morrow,' or 'to-morrow,' without any particular intention, repudiation takes place at the dawn of the morrow; and if he should say, 'I did not intend it to take effect till the end of the morrow,' the allegation would be good in conscience in both cases; but would it be so judicially? All are agreed that it would not be good judicially with respect to the expression 'to-morrow;' but there is a difference of opinion as to the expression 'in the morrow;' Aboo Huneefa being in favour of the admission of the plea even judicially, while both his disciples were opposed to its admission. So also, when a man has said, 'Thou art repudiated Ramzan,' or 'in Ramzan,' or 'Thou art

[1] The word means, literally, 'inclining towards;' when applied to time, it is 'towards the future.'

[2] *Inayah*, vol. ii. p. 140. These words will be found in Chap. IV. sec. 8.

[3] *Ibid.*, p. 180.

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repudiated a month,' or 'in a month;' but here if the expression were, 'Thou art repudiated in Ramzan,' it would have reference to the first of the proximate Ramzan; and in like manner if one were to say, 'Thou art repudiated in the fifth day,' it would be taken to mean the proximate fifth day; and an allegation that he meant not the proximate Ramzan or fifth day, but the one after that, could not be admitted in law, though it would be good in conscience. If, on the other hand, it were the fifth day on which he made use of the expression, 'Thou art repudiated on the fifth day,' it would be held to refer to the day actually current. So also, when he has said, 'Thou art repudiated Friday,' or 'in Friday,' and he happens to be speaking on a Friday, the repudiation takes effect at once, and is not postponed to the coming Friday, unless positively intended.

Effect of reference to two times without a conjunction;

with a conjunction, when the nearest time is the first mentioned;

when it is the last.

If a man should say, 'Thou art repudiated to day, to-morrow,' or 'to-morrow, to-day,' the first of the two times referred to is to be taken in both cases; so that in the first case the repudiation would take effect as of to-day, and in the second as of the morrow. And if he should say, 'Thou art repudiated to-day and to-morrow,' one repudiation would take effect immediately, and nothing besides; but if he should say 'to-morrow and to-day,' one would take effect to-day and another to-morrow. So also, when he has said to her in the night, 'Thou art repudiated in thy night and thy day,' a repudiation takes place on her the instant he is speaking the words; but after that nothing takes effect in the day, unless he should intend a repudiation to take effect at each time, when it would be agreeably to his intention. But when he has said to her in the night, 'Thou art repudiated thy day and thy night,' one repudiation takes effect on the instant of his speaking the words, and another at the dawn of the morning. While if he should say at night, 'Thou art repudiated in thy night and in thy day,' or should say to her by day, 'Thou art repudiated in thy day and in thy night,' one repudiation would take effect each time. If one should say to his wife in the middle of the day, 'Thou art

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repudiated the beginning of this day and the end of it,' this would be one repudiation; but if he should say, 'the end of this day and the beginning of it,' she would be repudiated twice; for a repudiation taking place in the beginning of the day must continue or be in existence in the end of it, so that there can be but one; but when it begins at the close of the day, the repudiation of the close of the day could not have taken effect till the beginning, so that there must be two repudiations. And it is stated in the Moontuka that the words 'Thou art repudiated to-morrow and after to-morrow' make only one repudiation on the morrow; so also the words 'yesterday and to-day' make but one; but if he said, 'to-day and yesterday,' there would be two repudiations; and if he should say, 'Thou art repudiated to-day and after to-morrow,' she would be repudiated twice, according to Aboo Huneefa and Aboo Yoosuf.

When the reference is to two times in the alternative.

If a man should say to his wife, 'Thou art repudiated to-morrow,' or 'after to-morrow,' repudiation would take effect after to-morrow; for it is a principle that when repudiation is referred to one of two times it takes effect as of the last of them.

When the reference is to a recurring time.

If one should say, 'Thou art repudiated the beginning of every month,' she would be repudiated three times, once at the beginning of each month; but if the words were, 'Thou art repudiated every month,' only one repudiation would take place. If he should say, 'Thou art repudiated every Friday,' intending thereby a repudiation on each such day, she would be repudiated every Friday until the repudiations became absolute by amounting to three; but if he intended only a continuance of the repudiation in perpetuity, or had no particular design, there would be only one. It is related by Busher, as from Aboo Yoosuf, that when a man has said to his wife, 'Thou art repudiated after days,' the repudiation takes place after seven days.

When the reference is to a time inclusive

If a man should say to his wife, 'When it is *Zoo'l Kaada* thou art repudiated,' and part of it has already passed, the repudiation takes effect while he is speaking;

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of that in which the repudiation is given.

and if he should say, 'Thou art repudiated on the coming of the day,' and this is said at night, she is repudiated at the dawn of the morning. But if it were said when the day is well advanced, the repudiation would not take effect till the same time on next day; while, if he had said, 'Thou art repudiated in the passing of the day,' and the words were said at night, it would not take effect till sunset of the morrow; and if they were uttered when the day was well up, it would take effect at the same hour on the morrow.

When to a time before the wife was in the husband's power.

If a man should say to his wife, 'Thou art repudiated yesterday,' when he had married her only to-day, nothing takes place, because the reference is to a time when he had no power to repudiate her; but if he had married her before yesterday, repudiation would take effect on the instant.[1]

When the reference is to an event in a given period.

When a man has said to his wife, 'Thou art repudiated before thy entry into the house in a month,' or 'before the arrival of such an one in a month,' and she should enter, or the person should arrive before the completion of a month from the time of speaking, she would not be repudiated; but if the entrance or the arrival should take place at the termination of a month from the time of speaking, she would be repudiated.

General rule when the reference is to two events.

It is a general rule, when repudiation is made to depend on two facts, that it takes effect on occurrence of the last of them, for if it were to take effect at the first, it would in fact be dependent on only one of them. When it is made to depend on one of two facts, it takes effect on the occurrence of the first of them; when dependent on a fact and a time, it takes effect once on the occurrence of each of them; and, when dependent on a fact or a time, if the fact occurs first, the repudiation takes effect without waiting for the arrival of the time; but if the time arrives first, repudiation does not take effect till the occurrence of the fact, the case being the same as if there were two times, and the repudiation had been referred to one of

[1] *Hidayah*, vol. ii. 167.

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them. And if he should say, 'When such an one comes, and when such an one comes, then thou art repudiated,' repudiation does not take effect till after the coming of both; but if the consequence were placed first, as, for instance, 'Thou art repudiated when such an one comes, and when such an one comes, she would be repudiated whichever of them should come first. So, also, if the consequence were placed between, and nothing would take place on the coming of the second, unless positively intended. And suppose a man to say to his wife, she being reclined at the time, 'Thou art repudiated in thy standing and thy sitting,' she would not be repudiated until she did both. And if she were sitting at the time, and should continue so for a while, and then stand up, or if she were standing at the time, and continuing so for a while, should then sit down, she would be repudiated in either case; but if the expression used were, 'Thou art repudiated in thy standing and in thy sitting,' she would be repudiated whichever she might do, but only once, though she were to do both. And if he were to say, 'Thou art repudiated when such an one comes, or when such an one comes,' one repudiation takes place whichever should come. And, in like manner, if he should say, 'Thou art repudiated when the beginning of the month has come, or when such an one has arrived,' repudiation would take effect on the arrival of either. But suppose him to say, 'Thou art repudiated the beginning of the month, or when such an one arrives,' then, if the arrival take place first, repudiation takes effect; but if the beginning of the month came before the arrival of such an one, repudiation does not take effect till his arrival.

Section Third

Of comparing[1] *Repudiation to something, or describing it.*

When a person says, 'Thou art repudiated like the number of such a thing,' mentioning a thing which, Effect of comparison on the

[1] Arab. *Tushbeeh*, assimilating.

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number of repudiations when it is to the number of something that has none,

or has no known existence.

like the sun and moon, has no number, one repudiation takes effect, and it is irrevocable, according to Aboo Huneefa. So also, if he should say, 'the number of *dirhems* in my hand,' when there is nothing in it; or, 'the number of fish in my tank,' there being none there at the time, one repudiation would take effect. And whenever repudiation is annexed to the number of anything of which it is known there are none, such as, 'the hairs on the palm of my hand,' or anything of which it is not known whether there be any or not, such as the 'hairs of the devil,' or the like, one repudiation takes effect.

Difference when the non-existence is supervenient.

But if it were annexed to the number of something which, in its own nature, has number, though none for some supervenient reason be in existence at the time of the vow, such as 'the hairs of my or your leg,' after they have been anointed with an ointment which has the effect of removing them by the roots, there would be no repudiation, because of the non-existence of the condition. So neither would there be any if he had said, 'Thou art repudiated the number of hairs on my head,' after it had been shaven.

Effect when the comparing is to an abstract number.

If a man should say, 'Thou art repudiated as a thousand,' or, 'like a thousand,' there would, according to general agreement, be three repudiations, if he intended three, or one, if he intended one, or had no particular intention in using the expressions; and the single repudiation would be irrevocable, according to Aboo Huneefa and Aboo Yoosuf; while if he had said, 'Thou art repudiated one like a thousand,' it would be so, according to them all; and if the expressions were, 'Thou art repudiated as number a thousand,' or 'number three,' or 'like number three,' there would be three repudiations in law and conscience, and if he meant anything else his intention would be void. But if he had only said, 'as three,' it would be three, if he intended three, and one, if he intended one, or had no particular intention in the matter; the single one, however, being irrevocable, according to Aboo Huneefa and Aboo Yoosuf. A man says to his wife, 'Thou art repudiated the number of the stars,' or 'the number of the lands,' or 'the number of the seas,' and

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she is repudiated three times; but if he were to say, 'like the devils,' or 'like the mountains,' or 'like the seas,' only one irrevocable repudiation would take effect, according to Aboo Huneefa and Zoofr. 'Thou art repudiated the number of the sand' would also induce a triple repudiation, according to general agreement.

When to the full of anything.

If a man should say, 'Thou art repudiated the full of the house,' it would be only one irrevocable repudiation, unless he meant three. So, also, if he said, 'The full of the mansion,' or 'the full of the well,' there would be three, if he intended three, or one irrevocable, if he intended one or two, or had no particular intention.

All repudiations by comparison are irrevocable.

It is a general principle with Aboo Huneefa that whenever repudiation is likened to anything it is irrevocable, be the thing small or great, and whether mention be made of the magnitude of the thing or not; while, according to Aboo Yoosuf, the repudiation is irrevocable if magnitude be mentioned, and is revocable if it be not mentioned, whether the thing to which the repudiation is likened be small or great. There are different reports as to Moohummud's opinion on the subject, some saying that he agreed with Aboo Huneefa, and others with Aboo Yoosuf. As an example of this difference of opinion between the two last, if a man were to say, 'Thou art repudiated like the magnitude of the point of a needle,' the repudiation would be irrevocable according to both Aboo Huneefa and Aboo Yoosuf, whereas if he were to say 'like the point of a needle' or 'a grain of mustard seed,' it would be irrevocable only according to Aboo Huneefa, but revocable according to Aboo Yoosuf. In like manner, if the expressions were 'like a mountain,' and "like the magnitude of a mountain,' the repudiation in the former case would be irrevocable according to Aboo Huneefa, but revocable according to Aboo Yoosuf; while in the latter it would be irrevocable according to both. But in all the cases there would be three repudiations, if three were meant. And if the repudiation were likened to snow, while it would be irrevocable according to Aboo Huneefa, it would be so in the opinion of his disciples only when

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the cold of the snow is intended, and revocable if its whiteness were meant.

Repudiation by exhibiting fingers.

If a man should say, 'Thou art repudiated thus,' and exhibit one finger, she would be repudiated once; and if he exhibit two fingers, she would be repudiated twice, and thrice if he exhibit three; but it is implied that the fingers are exhibited separately, and not together; and if he should say that he intended the closed hand, or the fingers together, the assertion could not be received judicially.

Repudiation with description is irrevocable or revocable, according to the nature of the description.

If a man should say, 'Thou art repudiated irrevocably,' or 'certainly,' or 'the most infamous of repudiations,' or 'the devils,' or '*Bûdâee* repudiation,' or 'the hardest repudiation,' or 'repudiation like a mountain,' or 'a strong,' or 'broad,' or 'long repudiation,' there would be one irrevocable repudiation in all the cases, unless three were intended; and if he intended one repudiation by the expression 'Thou art repudiated,' and another by the expression 'irrevocably,' or the like, two repudiations would take effect, and they would both be irrevocable. The general rule with regard to the description of repudiation is, that if the description be such as is not applicable to repudiation, the description is to be treated as a mistake or redundant, and revocable repudiation takes place; as, for instance, if one were to say, 'Thou art repudiated a repudiation that does not affect thee,' or 'on condition that I am to have an option;' and that when the description is applicable, and is no aggravation of the repudiation, as in the expressions 'the best,' or 'most excellent,' or 'most beautiful,' or 'most just of repudiations,' the repudiation is revocable; but that when the description is aggravating, as in the expressions 'the strongest of repudiations,' and the like, the repudiation is irrevocable, and single, unless three repudiations are intended, when three will take effect. Suppose one to say, 'Thou art repudiated a good,' or 'beautiful repudiating,' or 'such a repudiation as is not lawful to thee,' or 'such as does not take effect,' or 'on condition that I am to have an option for three days,' one repudiation would take effect, and the option would be void. And if the

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condition were that 'I am to have no power of revocation against thee,' still he would have the power of revoking it.

Section Fourth.

Of Repudiating before Consummation.[1]

How three repudiations are to be given to an unenjoyed wife.

When a man repudiates his wife thrice before consummation, three repudiations take effect upon her, unless there is a separation between the repudiations, and in that case she becomes irrevocably repudiated by the first, and the second and third do not take effect; as, for example, when he has said, 'Thou art repudiated, repudiated, repudiated,' or, 'Thou art repudiated one, and one, and one,' only a single repudiation takes effect. The rule in these cases is that when that which is first uttered takes effect first, there is but one repudiation, and when that which is first uttered is the second of taking effect there are two repudiations. Thus, if a person should say, 'Thou art repudiated one before one,' or 'one after it one,' only a single repudiation takes place; but if he were to say 'one before it one,' or 'one after one,' two repudiations would take effect;[2] so also, if he should say 'one with one,' or 'one with it one,' while if she were an enjoyed wife, two repudiations would take effect in all the cases. And if he should say, 'one preceded by two,' or 'one with two,' or 'one with it two,' or 'one before it two,' or 'one after two,' there would be three repudiations. And if he should say to her being unenjoyed, 'Thou art repudiated twenty-one,' three repudiations would take

[1] The repudiation of an unenjoyed wife being irrevocable, there is a difficulty in giving her more than one, because, as will be seen hereafter (p. 233), one irrevocable repudiation cannot be added to another.

[2] The one first uttered takes effect first in the one case and the second in the other, because the qualities indicated by the prepositions 'before' and 'after' (that is, priority and its opposite), when they are not accompanied by a pronoun, apply to that which precedes the preposition, and when accompanied by a pronoun, apply to that which follows the preposition. *Inayah*, vol. ii. p. 154.

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effect, according to 'our' three masters; so also, if he had said *eleven*; but if he should say one and ten, only one would take effect; so, also, one and a hundred, or one and a thousand, as reported by Husn from Aboo Huneefa, but according to Aboo Yoosuf there would be three.

How they may be given, subject to a condition.

If repudiation were suspended on, or attached to a condition, and the condition were made the antecedent, as, for instance, by the husband saying to his unenjoyed wife, 'If thou enterest the house then thou art repudiated, and repudiated, and repudiated,' there would be one irrevocable repudiation, according to Aboo Huneefa, on the occurrence of the condition, and the others would be treated as a mistake or redundant; but, according to the two disciples, three would take effect; and if she were an enjoyed wife that would be the result according to all their opinions; with this difference, that, according to Aboo Huneefa, the repudiations would take effect one after the other, while, according to the disciples, they would take effect simultaneously. If, on the other hand, the condition were placed last, as by the husband saying, 'Thou art repudiated, and repudiated, and repudiated if thou enterest the house' (whether the connective were *wa* or *fa*), and she should enter, she would become irrevocably repudiated three times according to all their opinions, whether enjoyed or unenjoyed. What has been said is on the supposition of there being a connective between the repetitions of 'repudiated;' but if this were not the case, and the condition were placed first, as in the example 'if thou enterest the house then thou art repudiated, repudiated, repudiated,' the woman being unenjoyed, the first repudiation would be suspended on the condition, the second would take effect on the instant, and the third be redundant: then, if under these circumstances, he should marry her again, and she should thereafter enter the house, the suspended repudiation would descend and take effect, but not so if the entrance were to take place in the interval between the irrevocable repudiation and the marriage; and if the woman were an enjoyed wife, while the first repudiation would be suspended on the condition, the

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second and third would both take effect on the instant. Now, if we suppose the condition to be placed last, the first repudiation would take effect on the instant, and the others be redundant, if she were an unenjoyed wife; whereas, if she were enjoyed, the first and second would take effect on the instant, the third remaining dependent on the condition.

Section Fifth.

Of 'Kinayát' or Ambiguous Expressions.

Kinayát defined.

Kinayát are expressions in which the purpose is concealed, and, being susceptible of another meaning besides repudiation, and consequently ambiguous, they require to be fixed to the latter by intention, or some substitute for it in the state or condition of the party making use of them.[1] Hence repudiation is not effected by them except with intention or evidence of the situation. They are of three different kinds. The first are those which are good for consent and nothing else, and they are three in number, viz. 'your business is in your hand,' 'choose,' and 'count.' The second are expressions which are good either for consent or refusal, but nothing else, and they are the following seven, viz., 'go out,' 'go,' 'withdraw,' 'rise,' 'veil yourself,' 'conceal yourself,' and 'cover yourself.' The third are expressions which are good for consent and reproach, and they are, 'thou art loosed,' or 'freed,' 'cut off,' 'separated,' 'unlawful.'

Three kinds,

and three states or frames of mind in which they may be uttered.

There are also three states or conditions in which the expressions may be uttered. First, *Reza* or satisfaction, when the husband is supposed to be in an agreeable frame of mind; second, *Moozakurah* or conversation, when the wife or some one on her behalf has asked for the repudiation; and third, *Ghuzub* or anger, when the husband is disturbed by passion.

The effect of the expressions

In the state of *Reza*, or satisfaction, repudiation is not effected by any of the *Kinayát*, or ambiguous expressions,

[1] *Inayah*, vol. ii. p. 156.

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varies according to the difference of state.

without intention; and if intention be denied by the husband, his word and oath are entitled to credit. In the state of *Moozakurah*, or conversation, repudiation is effected by all the expressions, except those comprised in the second class, which bear the construction both of consent and refusal.[1] And with regard to *Ghuzub*, or anger, whenever any of the ambiguous expressions have been used in that state, and the husband denies any intention to repudiate, he is to be credited, except only with respect to those comprised in the first class, which bear the construction of assent only, and not of refusal or reproach.

Additional expressions.

To the third kind of expressions, or such as express consent and reproach, Aboo Yoosuf, according to several reports, added four, viz., 'I have no way or means against you;' 'I have no power over you;' 'Your way is free;' and 'I have separated from you;' and, according to another report, he added six; that is, these four and two more: or, 'I have put you off,'[2] and 'Join yourself to your own people.' Nor does this exhaust the *Kinayát*, or ambiguous expressions, by which repudiation may be effected when used with that design. Thus, if a man were to say to his wife, 'The reins are on thy neck,' she would be repudiated if such were his intention, but not otherwise. So, also, other Arabic words, which have the meaning of 'go,' or 'remove,' have been classed with 'Join yourself to your people,' as effecting repudiation, when employed with that design. And the phrase, 'Purify your womb,' is classed with 'count,' as admitting of the same construction; and both are classed with 'Thou art single,' as all are held to imply a previous act of repudiation.

By three of the *Kinayát* only one revocable repudiation is effected.

The *Kinayát*, or ambiguous expressions, considered with regard to the kind and number of repudiations effected by them, may be divided into two classes. The first comprises the following: 'count,' 'purify your womb,' and 'thou art single;' and one revocable repudiation is

[1] That is, his word is not to be credited if he deny intention with any but those of the second class; for he is to be believed with regard to such expressions as are good for consent or refusal. *Hidayah*, vol. ii. p. 189.

[2] Arab *Khálátoki*, from *Khoolá*, of which see *post*, chapter viii.

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effected by them, and no more than one, even though three or two should be intended. The reason of this is, that these expressions imply a repudiation already effected, and something to be done in consequence of it; as if the man meant, when addressing them to his wife, 'Thou art repudiated, then count the courses necessary for thy purification,' or, 'then purify thyself;' and as there would be only one revocable repudiation if he had used the express words, 'Thou art repudiated,' so neither can it be otherwise when he only means them.[1] All the remaining ambiguous expressions are comprised in the second class, and by them one irrevocable repudiation is effected, and one only, even though two repudiations should be intended. But if three be intended, the intention, though not valid as to two, would be valid as to three.[2] And in the case of a female slave, intention would be valid as to two repudiations. If a man should give one repudiation to his wife, being a free woman, and should then say to her, 'Thou art *báin*,' or 'absolutely separated,' meaning thereby two repudiations, only one would take effect; but if he intended three, there would be three.

By all the rest irrevocable repudiation is effected, which may be single or triple according to intention.

All are agreed that though a man should say to his wife, 'By God, thou art not to me as a wife,' or 'Thou art not, by God, to me as a wife,' nothing would take effect, even if he intended repudiation; and if he should say, 'I have no need of thee,' intending repudiation, none would take effect; but if he were to say, 'Be prosperous' or 'free,'[3] intending repudiation, it would be so. When a man has said, 'Thou art not to me as a wife, and I am not to thee as a husband,' meaning repudiation, it takes effect according to Aboo Huneefa, though not so according to the other two; and if he should say, 'I am separated from thee,' 'I am unlawful to thee,' meaning repudiation,

Miscellaneous expressions.

[1] *Hidayah*, vol. ii. p. 188.

[2] *Ibid.* In Mr. Hamilton's translation (vol. ii. p. 236) it is said that if two are intended, two will take place, but in the printed original (vol. ii. p. 188) the words are, 'if he intend two, it is one irrevocable.'

[3] Arab *Iflahee;* some of the inflections from the original root being used for the purpose of divorce.—*Freytag.*

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it would take effect; but not if he were to say, 'I am separated,' or 'I am unlawful,' omitting 'from thee,' or 'to thee,' even though he intended repudiation. If a man should say, in a state of *moozakurah* (repudiation being the subject of discussion), 'I have separated thee,' or 'separated from thee,' or 'I have no power over thee,' or 'I have given thee to thyself,' or 'Thy way is open,' or 'Thou art free;' and she should say, 'I have chosen myself,' repudiation would take effect. And if he should say, 'I did not intend it,' he would not be believed in a court of justice. And if the wife should say to her husband, 'Thou art not a husband to me,' and he should say, 'I believe you,' intending repudiation, it would take effect according to Aboo Huneefa. It is related as from him, that when a man has said, 'I have given thee to thy people,' or 'thy father,' or 'thy mother,' or 'to husbands,' she is repudiated, if that be his intention; but if he should say, 'I have given thee to thy brother,' or 'maternal,' or 'paternal uncle,' or to 'such an one,' a stranger, there would be no repudiation. If a man should say to his wife, 'I have emancipated thee,' she is repudiated with intention. And the expressions 'be free,' or 'emancipated,' are equivalent to 'thou art free.' And if he were to say, 'Go to hell,' intending repudiation, she would be repudiated. If he should say, 'I have sold thy *tulák*,' and she should answer, 'I have bought,' there would be a revocable repudiation, but if he had added, 'for thy dower,' it would be irrevocable.

Three or two repudiations may be effected by the repetition of the word 'count.'

A man says to his wife, 'Count, count, count,' and declares that he means by the whole only one repudiation; though the assertion may be good as between him and his conscience, it cannot be admitted judicially, and three repudiations take effect. But if he should say, 'Count three,' and allege that by 'count' he meant a repudiation, and by 'three' three courses, the allegation would be received judicially. And if the words were 'count *fa* count,' or 'count *wa* count,' or 'count, count,' and repudiation were intended, two would take effect judicially.

A revocable or

An express repudiation may be added to another

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express one; as if a person should say, 'Thou art repudiated,' whereupon one repudiation would take place, and should then say, 'Thou art repudiated,' when another would take effect. So, also, an express repudiation may be added to one that is irrevocable; as if one should say, 'Thou art separated,' or should release her for property,[1] and then should say, 'Thou art repudiated,' whereupon another repudiation would in like manner take effect, according to 'us.' And an irrevocable repudiation may also be added to one that is express; as if one should say, 'Thou art repudiated,' and then should say, 'Thou art separated absolutely' (*báin*), whereupon another repudiation would take effect. But one irrevocable repudiation cannot be added to another that is irrevocable; as if a man should say, 'Thou art *báin*' (or absolutely separated), and then again, 'Thou art *báin*,' when only one irrevocable repudiation would take effect; because the last may be taken as merely declaratory of the first, and if the person should allege that it was so, he is entitled to belief; there being no necessity for taking it in a creative sense. But if he were to say, 'I intended to make a *ghuleez* (or aggravated) irrevocable repudiation,' regard must be paid to his allegation, and an aggravated illegality would in consequence be incurred.[2]

irrevocable repudiation may be added to one that is revocable,

and an irrevocable to a revocable;

but not to another irrevocable.

Section Sixth.

Of Repudiation by Writing.

Writings are of two kinds: *mursoom*, or customary; and *ghuer mursoom*, or unusual. The former are those which are properly superscribed and addressed, being such as are written to absent persons, and bear on their face, from such an one to such an one. The latter are those which are not so superscribed and addressed, and they are also of two kinds: *moostubeen*, or manifest, and *ghuer*

Two kinds of writings, customary and unusual.

The latter of two kinds, manifest and not manifest.

[1] When the repudiation would be irrevocable. See *post*, chap. viii.

[2] There are two kinds of irrevocable repudiation; the *khufee*, or light, and the *ghuleez*, or aggravated, which is triple and prevents marriage. *Hidayah*, vol. ii. p. 192.

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moostubeen, or not manifest; the manifest being such as are written on paper, or a wall, or on the ground, in such a manner that they can be comprehended and read; and those which are not manifest are such as are written on the air, or water, or something that cannot be comprehended and read. By writings that are not manifest repudiation cannot be effected, even though intended; whereas, by writings that are manifest, though not customary, repudiation is effected, when such is the intention, but not otherwise; while by writings of the customary, or regular description, it is effected, whether intended or not. Writings of this kind may either be so expressed that the repudiation takes effect on the mere writing, as when a person having prefaced his letter with the usual compliments, says, 'But after these you are repudiated,' whereupon repudiation takes effect, and an *iddut* becomes obligatory on the woman from the time of writing. Or the writing may be so expressed as to make the repudiation dependent on the receipt of the writing; as if one were to write, 'When this my letter reaches thee then thou art repudiated;' in which case repudiation does not take effect till the actual receipt of the letter. And if a person should write to the effect that 'When this my letter reaches thee then thou art repudiated,' and after that should proceed to write of his affairs, and the letter should reach its destination, repudiation would take effect, whether the letter be read or not. A man, writing to his wife about necessary affairs, says at the end of it, 'But after and when this my letter has come to thee thou art repudiated.' Having thus commenced, he defaces the writing as to repudiation, but the letter having come to her, she is repudiated notwithstanding. If, on the other hand, he should deface the writing about necessary affairs, leaving the writing as to repudiation, and should then send the letter to her, she would not be repudiated, because when he defaced the writing as to necessary affairs it became void, and the conditions could not be established. And if he had written in the beginning of the letter, 'But after and when this my letter has come to thee thou art repu-

Repudiation not effected by the last.

Effected by the manifest with intention.

By the customary without.

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diated,' and had then wrote about his necessary affairs and afterwards defaced the writing as to repudiation, leaving, however, the words, 'But after it,' she would not be repudiated. While, if these words 'But after' were defaced and the repudiation left, she would be repudiated.[1] If a man should write to his wife, 'When this my letter has reached thee, then thou art repudiated,' and the letter should go to her father, who takes and tears it up, without delivering it to his daughter; in such circumstances, if her father have the disposal of her affairs generally, and the letter reaches him in her town, repudiation takes effect, but not otherwise, unless it reaches herself; and if the father should inform her of the receipt of the letter, and deliver it to her torn as it is, then if it can be read and understood the repudiation will take effect, but not otherwise. When a man has written a repudiation and made an exception by tongue, or repudiated by tongue and made an exception in writing, would that be valid? There is no report on the subject, but it ought to be valid. A man is compelled by beating and imprisonment to write the repudiation of his wife, 'such an one, the daughter of such an one, the son of such an one,' and he writes that his wife, 'such an one, the daughter of such an one, the son of such an one,' is repudiated, but his wife, nevertheless, is not repudiated.[2] And if a man should say to another,

[1] Repudiation is constituted in all the cases as soon as the words are written, and cannot be retracted any more than if it were pronounced audibly. But it is suspended on a condition and cannot descend or take effect until the condition is fulfilled. It is so in the first case and the woman is repudiated. In the second the condition itself is nullified (which can of course be done in respect of private affairs) and the repudiation can never take effect. In the third case, the words 'but after' being left, indicate that the repudiation is not to take effect until some condition is fulfilled but no condition is mentioned, for the words cannot be connected with the necessary affairs. While these words being obliterated in the first case, no condition remains but the arrival of the letter, and that taking place, she is repudiated.

[2] The writing seems to be viewed as a declaration or acknowledgment. See *ante*, p. 210, distinction between a compulsory repudiation and compulsory acknowledgment.

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'Write to my wife a letter to the effect that If thou goest out of thy house then thou art repudiated,' and the other should write the letter, and the woman should have gone out of the house after the letter was written, but before it is read by the husband, and the letter is then read to him and sent to the wife, she would not be repudiated by means of the first going out.

Section Seventh.

Of Repudiation by Words of the Persian Language.

General rule.

The general rule with which the *futwa* accords in 'our' time with regard to repudiation in the Persian language is, that if among the expressions in use there is one which is not employed for any other purpose than repudiation, such a word is *sureeh*, or express, and repudiation is effected by it without intention when applied to a wife; and that expressions which are employed for repudiation, but not exclusively, being also used for other purposes, are to be reckoned as Persian *kinayát*, and their effect is the same in all respects as that of the *kinayát*, or ambiguous expressions of the Arabic language.[1] When a person has said to his wife, 'I have dismissed you from being my wife' (*behishtum tora uz zunee*)—it is known that the people of Khorassan and Irak were in the practice of employing this expression, and Aboo Yoosuf held it to be *sureeh*, or express, so that a *Rajâee*, or revocable, repudiation is effected by it, and that without intention. The *futwa* is in accordance with this; and if he should say, 'I have dismissed thee,' without adding the words 'from being my wife,' and the words were used either in a state of *Ghuzub* (anger) or *Moozakurah* (conversation, the subject being repudiation), there would be one revocable repudiation; and if he intended that it should be irrevocable, or triple, it would be according to his intention, Moohummud concurring with Aboo Yoosuf. Al Moorghe-

[1] The same rule seems equally applicable to the Hindoostanee or any other language.

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nanee was in the practice of decreeing for a revocable repudiation without intention, when the word *behishtum* was used, and in all other cases of making intention a condition, and the repudiation irrevocable.[1] If a woman should say to her husband in Persian, 'Hold back your hand from me,' and the husband should answer, 'Held back, take,' that would be repudiation if intended, and irrevocable. And if she should say, 'Hold me not,' and he should reply, 'Not held, take,' that also would be repudiation if intended, and irrevocable. A man says to his wife, 'Thou art of no use to me' (*mura bukar neestee*), intending repudiation, but none takes effect; and another, 'A thousand repudiations to thee' (*huzar tulák tora*), three repudiations take effect. A man says to his wife, 'I have given thee *tulák*;' this may be taken in three ways, as intending repudiation to take effect, or as intending a commission, or as being without any particular intention. In the first and third case it takes effect, but not in the second. If a woman should say to her husband, 'Hold your hand from me,' and he should answer, 'Go to hell,' repudiation would take effect.[2]

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[1] It would appear from this, that the verb *hishtun*, to 'quit' or 'dismiss,' is the only Persian word by which express repudiation can be given, and that all other forms of expression in that language are *kinayát*, or ambiguous. In Hindoostan the Arabic word *tulák*, with some appropriate verb, is, I believe, commonly employed.

[2] Here are but a few of examples that fill eight *quarto* pages.

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CHAPTER III.

OF TUFWEEZ, OR COMMITTING REPUDIATION TO ANOTHER.

As a man may in person repudiate his wife, so he may commit the power of repudiating her to herself or to a third party. This is termed TUFWEEZ, and it is of three kinds: IKHTIYAR, or choice; AMR BU YUD, or business in hand: and MUSHEEUT, or pleasure. The two first have been already met with as belonging to the second class of the *Kinayát*, or ambiguous expressions from which repudiation may be inferred. The last requires the imperative mood of the word by which the *sureeh*, or express repudiation is given,—as 'repudiate, if you please.' The discretion conferred by each kind of *Tufweez* will be found to correspond with the nature of the expression by which it is constituted.

SECTION FIRST.

Of IKHTIYAR, *or Choice.*

By the word 'choose,' a wife is empowered to repudiate herself

When a man has said to his wife, 'Choose,' intending repudiation thereby, or 'Repudiate thyself,'[1] she may repudiate herself at any time while she remains at the meeting,[2] though she should prolong it for a day or more, by not rising from it, or betaking herself to some other matter; and though he should rise from the meeting, the

[1] This is properly an example of *musheeut*. See *post*, section iii.

[2] This restriction to the meeting is founded on the general consent of the Companions. See *Hedaya*, vol. i. p. 244.

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matter is still in her hands so long as she continues at it herself; and it is not in his power to revoke the option he has given her, nor to prevent her from exercising it, nor to cancel what she may do under it. But if she should rise from the meeting, or betake herself to some other employment, known to induce a cutting off of what preceded it; as for instance, if she should ask for something to eat, or should fall asleep, or remove from the place, or wash, or stain her hands, or nails, or have to do matrimonially with her husband, or address another man with regard to sale or purchase; all these cancel her option. To drink water, or eat a small morsel without calling for food, would not have that effect. If she should sit up, or put on her clothes without standing, or do some small matter, such as would not indicate a turning away from what was in hand, her option would not be cancelled; and if she were to say, 'Call witnesses to attest my option,' or 'call my father that I may ask his counsel,'—or if she were standing, and should lean or sit down, she would still have her option; and so also, if she were sitting and should lean, according to the more authentic opinion. But if she were standing and should ride, or if she were riding on one animal and should transfer herself to another, or if when riding she should dismount, or *vice versâ*, the option would be at an end. If she were riding on an animal, or were borne along in a litter, and should stop, the option would remain; but if having stopped, she should proceed again, it would be cancelled.

at any time during the meeting.

What is a termination of the meeting.

What is not.

A man gives his wife an option, and before she can exercise it takes her by the hand and raises her up standing, or has matrimonial intercourse with her, with or against her will, the option is at an end.

The meeting may be terminated by the husband against her will.

If a man should give his wife an option, and she were not to hear him, or were absent, the option would remain to her during the meeting at which she is made acquainted with it; and if her husband should allege that she was aware of it at the meeting where it was given, and she should deny her knowledge of it, her assertion would be preferred.

What is accounted the meeting when the woman does not hear or is absent.

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Intention is necessary to give effect to the word 'choose;' and if the wife should choose herself on his saying 'choose' a single irrevocable repudiation would take place;[1] and it would not be triple even though the husband should have intended it. If after she has exercised the choice in her own favour he should deny any design to repudiate her, his word and oath would be preferred, unless he had given her the choice after *Moozakurah*, or mention of repudiation. In that case if she should choose herself, and he should say he had no intention to repudiate, his word would not be accepted judicially; nor would it be so if the expression were uttered in *Ghuzub*, or anger. And as his word would not be received judicially, so neither can his wife lawfully remain with him without a renewal of the marriage contract.

Intention is necessary to give effect to the word 'choose,' but only one repudiation is effected.

It is further necessary, to give effect to the repudiation, that the word 'self,' or the word 'repudiation,' should be combined with the word 'choose,' on one side or the other; either by the husband's saying, 'Choose thyself,' or 'choose repudiation,' or 'choose a choice,' or by the wife saying, 'I have chosen myself,' or 'I have chosen repudiation,' or 'chosen a choice,' whereupon repudiation would take place. And if he were merely to say, 'Choose,' and she were to say, 'I have chosen,' nothing would take effect. So also if he were to say, 'Choose,' and she, 'I have done it;' but if his words were, 'Choose thyself,' and hers, 'I have done it,' she would be repudiated. It is also a condition that the word 'self' be mentioned in conjunction with 'choose;' or if separated from it the word must be uttered at the meeting, and in that case the repudiation would be valid, but not otherwise. Repetition of the word 'choose' is a substitute for the mention of 'self;' and so also the wife's saying, 'I have chosen my father or mother,' or 'my people,' or 'husband,' it would suffice for mentioning herself; contrary to the case of her

The word 'self' or 'repudiation' must be added to 'choose' either in giving or exercising the choice.

Substitutes for the word 'self.'

[1] The word 'choose,' it will be recollected, is among the second class of the *kinayát*, or ambiguous expressions, by all of which an irrevocable repudiation is effected.

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saying, 'I have chosen my tribe,' or 'my relations within the prohibited degrees,' when repudiation would not take effect, that is, if she had father or mother, but if she had neither, and had a brother, repudiation ought to take effect. And suppose him to say, 'Choose,' and her to say, 'I have chosen,' and then to add, 'I intended myself,' if this were at the meeting she would be repudiated, her assertion being worthy of credit; but if it were not till after rising from the meeting, there would be no repudiation, and her assertion would not be credited.

If a man should say to his wife, 'Choose,' and she should say, 'I choose myself,' she would be repudiated on a favourable construction.[1] If she were to say, 'I have separated myself,' or 'made myself unlawful,' or 'repudiated myself,' the answer would be sufficient, and irrevocable repudiation take effect.

Effect of adding the word 'repudiation.'

If the choice be given in connection with the word *tulák* (repudiation), as if he were to say, 'Choose *tulák*,' and she should say, 'I have chosen *tulák*,' there would be one revocable repudiation.[2] And if he should mention three in the choice, as by saying, 'Choose three,' and she were to say, 'I have chosen,' it would take effect three times. If he say, 'choose, choose, choose,' and she answer, 'I have chosen the first,' or 'the middle,' or 'the last,' three repudiations would take effect without intention, according to Aboo Huneefa, but only one according to the other two, while if her words were, 'I have chosen a choice,' or 'the choice,' or 'once,' or 'for once,' or 'one,' there would be three according to them all. So, also, if her words were, 'I have repudiated myself,' or 'I am repudiated,' it would be deemed an answer as to the whole, and she would be repudiated three times.

What is a rejection by the wife of the option.

If a woman should say, 'I do not choose repudiation,' that would be a rejection of the option; but if she merely say, 'I desire or love my husband,' her option would re-

[1] Only on a favourable construction, because the word being in the aorist tense, may have either a present or future signification.

[2] Because the word *tulák* restricts the choice to its own meaning. See *ante*, p. 212.

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main; while if she should say, 'I abominate separation from my husband,' that would be to choose him, or in other words, to reject the option. But if she say, 'I have chosen not to be thy wife,' she would be irrevocably repudiated.

How the option given is construed when given through a third party.

If a man should say to another, 'Give my wife a choice,' she has none until he do so: but if the words were, 'Inform her of her choice,' and she should hear of it through another channel before he gave the information, and should 'choose herself,' repudiation would take effect.

The period of option may be enlarged to a month or year, &c.

When a man has said to his wife, 'Choose thyself to-day,' or 'this month,' or 'a month,' or 'a year,' she may exercise the option at any time within the given period, though she should move from the meeting or engage in some other business. If his words were, 'Choose this day,' or 'this month,' the option is only for what may remain of the day or the month, and no more; whereas, if it were for a day, the option would extend from the time of speaking to the same hour on the morrow, and so, if it were for a month, the period would be reckoned from the time of speaking until the completion of thirty days. When the choice is thus restricted to a particular time, it is cancelled by the lapse of the time, whether the wife were aware of it (that is, of having the option) or not; which is contrary to the case of an unrestricted option.[1] If he should say, 'Choose to-day, and choose to-morrow,' and she were to reject the offer to-day, it would not be cancelled for the morrow; but if the words were, 'Choose in to-day and to-morrow,' and she were to reject to-day, the whole option would be at an end.

Section Second.

Of Amr bu yud, *or Business in hand.*

Subject to the same condition

Amr bu yud is like *Ikhtiyar*, in requiring the use of the word 'self,' or some substitute for it, and as to the hus-

[1] See *ante*, p. 239.

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band's having no power to recall the authority given to the wife, and in all other respects except that intention to give three repudiations is valid in this case, though not in the other. When a man has said to his wife, 'Thy business is in thy hand,' intending repudiation, and she has heard him speak, the power is in her hands while she continues at the meeting; or if she has not heard him speak, the power is in her hands when she becomes cognizant of its having been conferred on her. If she were absent, and the option was given generally, she may exercise it any time during the meeting at which the intelligence reaches her; but if it were restricted to a particular time, and the intelligence reaches her before the expiration of the period, she has only the remainder of the time to exercise her option; while if the whole period should have elapsed before the intelligence reaches her, the option is at an end.

as *Ikhtiyar*, with one exception.

If the man should say, 'Thy business is in thy hand,' intending three repudiations, and she should say, 'I have chosen myself with one,' still there would be three repudiations; and if she should repudiate herself thrice, there would be three; though if he intended two, there would be but one.[1] In like manner, if she should say, 'I have repudiated myself,' and 'have chosen myself,' without saying 'thrice,' still there would be three repudiations; so also, if she had said, 'I have separated myself,' or 'rendered myself unlawful,' or used other expressions suitable for an answer. When a woman has said, 'I have repudiated myself once,' or 'have chosen myself by one repudiation,' it is one irrevocably.[2] When a man has put his wife's business in her hand, and she has chosen herself at the meeting where she is made acquainted with the fact, she is repudiated once irrevocably; and if her husband had intended three repudiations, there would be three; but if he intended two, or one, or had no particular intention, there would be only one repudiation. When

Effect and number of repudiations regulated generally by intention.

But the repudiation is irrevocable.

[1] See *ante*, p. 231.

[2] Being the answer to *Amr bu yud*; by which, as one of the second class of *kinayát*, an irrevocable repudiation is effected.

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he has said, 'Thy business is in thy hand in one *tulák*,' it is a revocable repudiation.[1]

Acceptance is an exercise of the option.

When a woman's business has been given into her hands, and she has said, 'I have accepted myself,' she is repudiated; so also if she have said, 'I have accepted it.'

Words that are equivalent to 'hand' in the phrase, 'Thy business,' &c.

If he should say, 'Thy business is in thy hand,' or 'thy palm,' or 'thy right hand,' or 'thy left hand,' or 'I have given the affair into thy hand,' or 'entrusted the whole affair in thy hand,' intending repudiation, it would be valid; and the words 'in thy mouth,' or 'in thy tongue,' are equivalent to 'in thy hand.' And if he should say, 'My business is in thy hand,' that, according to the most approved opinion, would be equivalent to 'Thy business is in thy hand.

Disputes regarding intention

When a husband has not intended to repudiate by the words, 'Thy business is in thy hand,' they are of no avail except when uttered in anger, or in a conversation regarding divorce. In either of these cases, if he should deny the intention, his assertion is not to be received with implicit credit; and if the wife should sue for a divorce on the ground that he intended to repudiate her, or that the expressions were uttered in *Ghuzub* or *Moozakurah*, though his word and oath would be preferred, yet her proof would be received with respect to the fact of *Ghuzub* or *Moozakurah*. With regard, however, to his intention to repudiate, her proof could not be received unless it were adduced to the fact of an acknowledgment by him. And

and the exercise of the option.

when he has put her business in her hand, and she has repudiated herself, and he then alleges that she did so after taking to some other matter in word or deed, while she denies the allegation, asserting, on the other hand, that the option was exercised at the meeting before any such taking to any other matter in word or deed, her word is preferred, and repudiation takes effect. The suit of a woman against her husband that he gave her business into

[1] If it be objected that the repudiation ought to be irrevocable on account of the *Amr bu yud*, the answer is that the question with *tulák* has the effect of making it revocable. *Kifayah*, vol. ii. p. 200.

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her own hands cannot be heard; but if she should repudiate herself in pursuance of the authority given to her, and should then sue for effect to be given to the repudiation, and for her husband's being made liable for the dower, her suit must be heard, though she is not entitled to bring the matter before the judge, in order that he may compel her husband to place the business in her hands. A man having put his wife's business into her hands if she stood up, and she having stood up repudiated herself; but he denies that she did so at the meeting at which she became acquainted with what he had said, while she maintains the contrary, her word is to be preferred.

Various expressions by which repudiation is effected under the option.

A man places the business of his wife in her hands, and she says to her husband, 'Thou art unlawful to me,' or 'art separated from me,' or 'I am unlawful to thee,' or 'separated from thee,' repudiation takes effect. But if 'to thee' and 'from thee' were omitted in the two first expressions, they would be void; while their omission in the two last would not have the same effect, and repudiation would follow.

The option may be extended to a month or a year, &c.

If a man should say to his wife, 'Thy business is in thy hand a day,' or 'a month,' or 'a year,' or 'the day,' 'the month,' or 'the year,' or 'this day,' 'this month,' or 'this year,' her option would not be restricted to the meeting, but might be exercised whenever she pleased during the period indicated. And if she were to rise from the meeting, or take to some other employment without answering, her option would not be cancelled, so long as there remained any part of the time; without any difference of opinion. If the period were stated indefinitely, it would in all the cases be reckoned from the time of speaking to the same time on the morrow, or that day month, or year, as the case might be; while, if the period were stated definitely, the option would be only for the remainder of the day, month, or year, as the case might be. If the option is once exercised in favour of herself, it cannot be so exercised again during the period; and if she were to say, 'I have chosen my husband,' or 'do not

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choose repudiation,' the matter would be out of her hands for the whole period, according to Aboo Huneefa and Moohummud, so that she could not afterwards choose herself. If a husband should say, 'The business of my wife is in the hand of such an one a month,' it would have reference to the current month, and the authority would expire with it, though the person were not aware of it. And if one should say to his wife, 'Thy business is in thy hand for ever,' and she should reject it once, it would become void.

Power to repudiate by this form may be given to a third party.

If a man should say to another, 'My wife's business is in your hand for a year,' it would be so for a year; and the authority could not be recalled by the husband, but would expire of itself on the completion of the year. When a man says to a stranger, 'My wife's business is in your hand,' it is limited to the meeting, and he has not the power of recalling it while the meeting lasts. If the person who is entrusted with the power should hear what has been said, the power lasts only during the meeting, but if he should not hear what has been said, or was absent at the time, the power continues with him during the whole meeting at which he receives information of its having been conferred on him; and acceptance of the commission at the meeting is not a condition, though, if rejected, it would be at an end by the rejection. A man says to another, 'Say to my wife, "Thy business is in thine hand,"' but the power is not actually in her hands until the person rehearses to her what he was directed to do; yet if the words were, 'Say to my wife her business is in her hands,' the power would be in her hands before the intelligence is communicated to her.

Effect of the word 'repudiate' when

If a man should say to another, 'Repudiate my wife, *fa*[1] I have already given this to thee,'—it would be a

[1] *Fa*, though a particle of conjunction, does not ordinarily indicate a simple connection between the two propositions which it unites, but rather that the second depends on the first as a consequence. (De Sacy, *Gram. Arab.*) The particle being ambiguous, I think it better to leave it untranslated in the text. The reader can supply 'as,' 'for,' or 'so.'

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commission restricted to the meeting which the husband might recall; and if the person should repudiate her at the meeting, the repudiation would be single and revocable. So, also, if he should say to the person, 'I have given to thee her repudiation, *fa* repudiate her,' the power would be restricted, and the repudiation revocable. But if a man were to say to another, 'Repudiate her, *wa* I have already given her business into thy hand,' or should say, 'I have given her business into thy hand, *wa* repudiate her,' the second would be different from the first; for *wa* (and) is a connective, while *fa* in these places is explanatory of the cause, and the person entrusted when that is employed has power only as to one repudiation. If then, when *wa* is employed, the agent should repudiate at the meeting, the woman would be repudiated by two repudiations; and they would be irrevocable, because what is done in consequence of the *amr* is irrevocable, and one of the repudiations being irrevocable the other is so also of necessity, and the husband has no right to recall it. If, however, the agent should not repudiate till after rising from the meeting, only one revocable repudiation would take effect;[1] and so also if the husband had said, 'Her business is in thy hand, *fa* repudiate her.' But it is reported in the Jamâ that when a person says to another, 'The business of my wife is in thy hand, *fa* repudiate her,' and the agent repudiates her before rising from the meeting, there is one irrevocable repudiation, unless the husband intend three, when it is triple; and that if the person should rise from the meeting without repudiating her, the commission would be void, so also if he had said, 'Repudiate her, *fa* her business is in thy hand.'

accompanied by an *amr bu yud.*

If a man should put his wife's business in her own hand, or in that of a stranger, and should then become insane, that would not invalidate the authority though the insanity were continued. And if the authority were given to a youth under puberty, or to an insane person,

The authority is not invalidated by subsequent insanity of the hus-

[1] Agency to repudiate is not restricted to the meeting. See *post*, p. 254.

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band; and may be given to one under puberty.

or a slave, or an infidel, it would remain in his hands till his rising from the meeting, in the same way as if the authority had been given to the wife herself; and if he were to say to his wife, she being under puberty, 'Thy business is in thy hand,' intending repudiation, and she should repudiate herself, it would be valid, and the repudiation take effect. A man put his wife's business in the hand of her father, and he said, 'I have accepted her,' repudiation took effect.

A choice by the wife of herself without authority is not rendered valid by a subsequent sanction of the husband.

A *fuzoolee* says to the wife of another person, 'I have put your business into your hand,' whereupon she says, 'I have chosen myself;' and on the intelligence reaching her husband, he allows the whole matter, yet she is not repudiated, but her business is placed in her hands by the allowance of her husband, for the meeting at which she may receive the intelligence of his allowance. And in like manner, if the wife should say to herself, 'I have put my business into my hands, and have chosen myself,' and the husband should allow the whole matter, repudiation would not take effect, but the business would be in her hands by his allowance; while, if she should say, 'I have put my business in my hand, and have repudiated myself,' and her husband should allow this, one revocable repudiation would take effect on the instant, and her business would be in her hands, so that if she should then say, 'I have chosen myself,' another irrevocable repudiation would take effect. If a wife should say, 'I have chosen myself,' and her husband should say, 'I have allowed it,' there would be no repudiation, even though he intended it. But if she should say, 'I have separated myself,' and he say, 'I have approved,' it would take effect, when intended; while, if she should say, 'I have made myself unlawful to thee,' and he reply, 'I have approved,' he would become a *Moolee*,[1] for to make unlawful that which was lawful is in truth *eela*, but in 'our' usage it amounts to repudiation, and she would be repudiated.

But a repudiation in these circumstances is rendered valid by his sanction.

So also a repudia-

If a person should say, 'The wife of Zeyd is repu-

[1] The person who makes an *eela*. See *post*, chapter vii.

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diated,' and Zeyd should say, 'I have allowed,' or 'am content,' or 'have made it obligatory on myself,' repudiation would become obligatory. And if a husband should say, 'I have sold to thee thy business in thy hand for a thousand *dirhems*,' and she should make choice of herself at the meeting, it would be a repudiation, and she would be liable for the money. tion by a third party.

When a husband has joined together different words of *tufweez*, that is, 'Thy business is in thy hand,' 'choose,' 'repudiate,' and mentions them without a connecting particle, each one is made a separate sentence. If the particle *fa* be interposed between the words of *tufweez*, the word by which it is followed, if susceptible of being used in explanation, is explanatory of that which precedes it, and if not susceptible of being used in explanation, it is the cause of that which precedes it. And it is to be observed that the word 'choose' is capable of being made explanatory to 'your business is in your hand,' but not *vice versâ*; and that 'choose' is not good as an explanation of 'choose,' nor *amr* of *amr*, as a thing cannot be explanatory of itself. When, therefore, a man has said to his wife, 'Thy business is in thine hand, repudiate thyself,' or 'choose, repudiate thyself,' and she says, 'I have chosen myself,' whereupon the husband replies, 'I did not intend repudiation,' he is to be believed, and nothing takes effect on her. But when he has said, 'Thy business is in thy hand, *fa* choose, *fa* repudiate thyself,' and she says, 'I have chosen myself,' whereupon he subjoins, 'I intended by none of these repudiation,' he is not to be believed, and one irrevocable repudiation takes effect by his saying, 'Thy business is in thy hand,' subject to his oath, 'by God, I did not intend three thereby.'[1] And if he should say, 'Choose, *fa* thy business is in thy hand, *fa* repudiate thyself,' and she should answer, 'I have chosen myself,' or 'I have repudiated myself,' she would be repudiated once irrevocably by his having said, 'Thy business Effect of combining different forms of *tufweez* as proof of intention.

[1] *Fa* being explanatory, the words that follow are like a repetition of the *Amr bu yud*, and a sufficient manifestation of intention. See *ante*, p. 241.

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is in thy hand.' And when he has said, 'Thy business is in thy hand, *fa* repudiate thyself,' or he has said, 'choose, *fa* repudiate thyself,' and she should say, 'I have repudiated myself,' or 'I have chosen myself,' there would be one irrevocable repudiation. But if he should say, 'Thy business is in thy hand, *wa* repudiate thyself,' or he should say 'choose, *wa* repudiate thyself,' and she should say, 'I have chosen myself,' there would be nothing, unless the husband intended repudiation. And if she should say, 'I have repudiated myself,' a revocable repudiation would take effect by means of the direct expression 'repudiate,' unless he had intended three by the words, 'and repudiate thyself.' And if he had said, 'Thy business is in thy hand, *wa* choose, *wa* repudiate thyself,' and she should choose herself, nothing would take effect. So also if he should say, 'Thy business is in thy hand, *wa* choose, *fa* choose;'[1] or if he should say, 'choose, *wa* thy business is in thy hand, *fa* thy business is in thy hand;' but if he should say, 'Thy business is in thy hand, *wa* choose, *fa* repudiate thyself,' and she should choose herself, she would be repudiated twice,—subject to his oath that he did not intend three by the words 'thy business,' &c.[2] And if he should say, 'I have put thy business in thy hand, *fa* thy business is in thy hand, *fa* repudiate thyself,' the *amr* is only one, and the third, or '*fa* repudiate thyself,' is explanatory of it.

The discretion may be attached to a condition definitely or indefinitely as to time.

When a discretion to repudiate is attached to a condition, it may be absolute with regard to time, or may be limited to a particular period. In the former case, as if a husband should say, 'When such an one has arrived your business is in your hand,' and the person should arrive, her business would be in her hand for the meeting at which she became aware of his arrival; while in the latter case, as if the husband should say, 'When such an one has arrived your business is in your hand for a day,' or 'for the day

[1] The particle *wa* not being explanatory, and 'choose' not explanatory of itself.

[2] For similar reasons, 'Thy business,' &c., not being capable of explaining 'choose' of itself.

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in which he may arrive,' and the person should arrive, she being cognizant of the fact, the business would be in her hand during the whole of the time limited (except that when a day is mentioned indefinitely, she has a whole day, and if definitely only the remainder of the day), and the power is not cancelled by her rising from the meeting. But she can exercise the choice only once during the whole time. If she is not cognizant of his arrival till after the expiration of the time, she has no option under this commission for ever.

When the condition is the non-payment of a debt to a third party.

When a creditor has said to his debtor, 'If you do not pay me my right in a month the business of your wife will be in my hands,' and he has replied, 'Let it be so,' and the condition happens, the creditor may repudiate her.

When it is a second marriage;

A man having placed the business of his wife in her hand, if he should marry another woman upon her (that is, while she is still his wife), she sues her husband on the ground that he has married such an one, the person mentioned being present admitting the fact, and witnesses also attesting the marriage,—the business is thereupon in her hand. But suppose that the second wife is absent, and that the first adduces proof against the husband, saying, 'Thou hast married upon me such an one, the daughter of such an one, the son of such an one, and my business is in consequence in my hand,' would her suit be heard? There are two reports, and according to the more authentic it would not, because she cannot be a plaintiff in establishing the marriage against the other in her absence.

or absence for a specified time.

When a man has said to his wife, 'If I am absent from the town of Bookhara thy business is in thy hand,' and then goes to a village out of the city, the business is in her hands. A man puts the business of his wife into her hands to repudiate herself, if he should go out of the city of Bookhara without her permission, and then goes out to Kook Serrae and abides there two days, she is not repudiated. A man places his wife's business in her hand, if he does not give her such a thing within a specified time, and the time having expired she repudiates herself, whereupon a dispute arises between the parties, the husband saying, 'I gave the

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thing within the time,' and she denying it, his word is to be preferred as to the question of repudiation, so that it does not take effect. A man, intending to be absent from his wife from Samarkand, is asked by her for maintenance, whereupon he says, 'If I do not send you maintenance from Kush till ten days your business is in your hand to repudiate yourself whenever you like,' and he sends her maintenance before the expiration of ten days, but from another place; is her business in her hand? It may be inferred from what is stated in the *Futawa* of Zuheer ood Deen that the business would be in her hand; for he has reported that if a man should say, 'If I do not send you maintenance from Kurmena in ten days, then you are repudiated,' and he should send within the time, but from another place, it would be a breach of the vow. If the words were 'if maintenance does not reach you in ten days your business is in your hands,' and she is rebellious by going to her father's without his permission within the time, repudiation does not take effect, though he should fail to send her the maintenance.[1]

On beating her without a fault.

When a man has put his wife's business into her hand to repudiate herself if he should strike her without a fault, and he beats her, whereupon a dispute arises as to the fact of her having committed any fault; upon this point his word is preferred. But suppose she has gone out without his permission and he beats her, does that put the business into her hand? It has been said that it does not if he has paid up so much of her dower as is prompt, but if he has not done so, she may go to her father's house without his permission and refuse herself to his embraces, and her going out is therefore no fault; but Sheikh Zuheer-ool-Moorghenanee was of opinion that there was no ground for this distinction, her going out without his permission being a fault absolutely. The first opinion, however, is more correct. A man says to his wife, 'If I don't give thee two *deenars* in a month thy business is in thy hand,' whereupon

[1] Because while *nashizah*, or rebellious, she has no right to maintenance.

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she contracts debt and refers her creditor to him; in these circumstances, if before the expiration of the time he pay the creditor, she has no power to repudiate herself; but if not, she has. Or he has said to her, 'If I am absent from thee six months, and do not join thee in person and send thee maintenance within the time, thy business is in thy hand;' whereupon he is absent and does not join her in person, but sends maintenance; the business is in her hands, because here the repudiation is made dependent on the not doing of two things in the time, and the consequence is incurred by the failure in one of them. Whereas if it were dependent on two facts, it would not be incurred till both had taken place. Thus if he had said, 'If thou enterest this mansion and that mansion thou art repudiated,' repudiation would not take place till she had entered both.

When a man has said to his wife, 'If I beat thee without a fault thy business is in thy hand,' and she abuses him, or seizes his beard, or says to her husband, 'O ass!' or 'O fool!' or 'God bring you to death;' these are faults. Exposing her face to one not within the forbidden degrees is considered by some a fault, by others not; and Koodooree seems to agree with the latter, for he says 'that the face and palms are not *âwrut*, or parts that ought to be concealed,' but the other seems to be the more valid opinion. So also it would be a fault if she make her voice be heard by a stranger, as by speaking to him, or designedly so loud that he hears her. If she commit something that is legally an offence, and he does not beat her, but some time after she does something that is not a legal fault and he beats her, whereupon she repudiates herself; and the husband alleges that he beat her for the first fault, while she insists that it was for the second, his word is to be preferred. If he take the *lián* or imprecation against her, and she retaliates by taking it against him, whereupon he beats her; some say this is no fault, but the majority of doctors are of opinion that it is, and

Continued.

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the opinion is valid. So also if he should slander her mother and she slander his in return.[1]

Section Third.

Of Musheeut, *or Pleasure.*

The words 'Repudiate thyself,' addressed to a wife, are sufficient authority for her to do so.

When a man has said to his wife, 'Repudiate thyself' (whether he say 'if you please,' or not), she may repudiate herself at the meeting, and he cannot divest her of the power. In like manner, when a man says to a third party, 'Repudiate my wife,' and refers it to his pleasure, the result is the same; but if there is no reference to his pleasure, it is an appointment of agency, which is not restricted to the meeting, and may be revoked. So also, when a man says to his wife, 'Repudiate thy co-wife,' the authority is an agency and is not restricted to the meeting.

When he intends three she may give herself that or any less number.

A man says to his wife, 'Repudiate thyself,' intending three times, and she does so together or separately, or merely says, 'I have repudiated myself,' three repudiations take effect; and if she should give herself one, or two repudiations, one or two would take effect in like manner; but if she were to give herself only one, and after remaining silent, should then say 'two,' one only would take effect. If he intended two, there would be only one repudiation, unless the woman were a slave; while if he intended one, and she gave herself three, there would be none, according to Aboo Huneefa, but according to the two disciples one repudiation would take effect. And if she should repudiate herself once, her husband having no particular intention, or intending one, the repudiation would be revocable. So, also, if she should say, 'I have separated myself,' or 'I am unlawful,' or 'separated,' or 'cut off,' or 'free.' But if she should say, 'I have chosen myself,' she would not be repudiated, and the matter would pass out of her hands.

[1] The examples in this section are but a few of the original, which cover sixteen quarto pages.

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If he should have said to her, 'Repudiate thyself three times,' and she should do so only once, there would be but one repudiation; but if he had said, 'Repudiate thyself once,' and she should give herself three repudiations, there would be none according to Aboo Huneefa, though in the opinion of his disciples there would be one here also. And if she were to say, 'I have repudiated myself one, one, one,' one repudiation would take effect (apparently without any difference of opinion), the other two being surplusage. If he should say, 'Repudiate thyself one revocable repudiation,' and she should repudiate herself irrevocably, or *vice versâ*, the repudiation would be as appointed by the husband, however she might act under his direction.

So also when he has said three repudiations.

When a man has said to his wife, 'Repudiate yourself, if you please,' and she repudiates herself thrice, nothing takes effect according to Aboo Huneefa, but in the opinion of his disciples there would be one repudiation. And when the words are, 'Repudiate yourself when you please,' she may repudiate herself at the meeting or after it, and has one option; but if the words were 'whenever' or 'as often as,' the power would continue in force till exercised three times.

When he has added 'If you please.'

If a man should say to his wife, 'Repudiate yourself thrice, if you please,' and she says, 'I am repudiated,' nothing takes effect unless she says, 'I am repudiated three times.' And if in answer to 'Repudiate yourself, if you will,' she should say, 'I have already willed to repudiate myself,' nothing would take effect. So also, if she should merely say, 'I have already willed.'

Or 'Thrice if you please.'

If a man should say to his wife, 'When the morrow comes repudiate thyself for a thousand *dirhems*,' and then before the coming of the morrow retracts, his retractation is of no effect; but if the woman had said to her husband, 'When the morrow comes, then repudiate me for a thousand *dirhems*,' and should retract before the coming of the morrow, the retractation would be good. And if he should say, 'Thou art repudiated if thou wilt,' and she should answer at the meeting, 'I have willed,' it would take effect.

When the authority is referred to a particular time, and is retracted before it.

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When the reference is general.

When a man has said, 'If I marry such an one, she is repudiated if she will,' and he marries her, she has the *musheeut*, or right to repudiate herself at the meeting where she becomes acquainted with what he said. If a man should say, 'Thou art repudiated when' or 'whenever thou wilt,' she may exercise the option at the meeting or after rising from it, but she can repudiate herself only once. So, also, if the words were 'at the time you wish,' the option would not be restricted to the meeting.

Miscellaneous cases of commission and agency to repudiate.

The guardians of a woman having asked her husband to repudiate her, he said to her father, 'What is this that thou desirest of me? I will do what thou desirest,' and then went out, whereupon her father repudiated her; but the repudiation does not take effect unless the husband intended a commission to the father, and his word will be preferred if he should deny his intention. When a person has said to a man, 'Repudiate my wife,' he may do so either at the meeting or after it, but the husband may retract. And if a man should say to his wife, 'Repudiate thyself and thy companion,' she may repudiate herself at the meeting, for it is a *tufweez*, or commission, so far as she is concerned, and she may repudiate her companion either at the meeting or elsewhere, for it is an agency with regard to her. And if a man should say to two others, 'Repudiate ye my wife if you please,' one of them cannot repudiate her separately without the other; but if he should not add the words 'if you please,' it would be an agency, and one alone of them is competent to repudiate, without the concurrence of the other. When two men have been appointed agents to repudiate, each of them may repudiate the woman when it is not for property; but if the husband should say, 'One of you is not to repudiate without the other,' and one of them should nevertheless repudiate, and then the other should repudiate, or one should repudiate and the other approve, nothing would take effect. And if the authority were to two to repudiate three times, and one of them were to give one repudiation, and then the other two more, none would take effect. When one man has said to another, 'You are my agent to repudiate my wife, if you

Joint commissioners cannot act separately.

But joint agents can,

unless restricted.

An appointment of agency

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please,' and he has declared it his pleasure at the meeting, this is lawful; but if the agent should rise from the meeting without doing so, the agency is void. When a man has said to another, 'Repudiate my wife three times, if she please,' he does not become the agent until she expresses her pleasure, and she has the option of doing so during the meeting at which she receives the information, and when she has declared her pleasure at the meeting, so that he becomes the agent, and the agent repudiates her at that meeting, the repudiation takes effect; but if he should rise from the meeting the agency would be cancelled. Sheikh Hulwaee has remarked that this is worthy of special remembrance, for most of the letters of repudiation which are given are to this effect: 'I have written to thee this letter. Ask my wife, does she wish for repudiation; and if she does so then repudiate her.' And many agents postpone the repudiation till after the meeting at which the woman has expressed her wish, not knowing that the repudiation does not take effect. When one man has said to another, 'Thou art my agent to repudiate my wife, on condition that I am to have an option,' or 'that she is to have,' or 'such an one to have an option,' the agency is lawful, but the option void.

qualified by 'if you please' is a commission.

When a man has said to another, 'I appoint you my agent for all my affairs,' and the agent has repudiated his wife, authorities differ with regard to such a repudiation, but the correct opinion is that it is not valid. But if the words of appointment were, 'I have made you my agent in all my affairs in which agency is lawful,' the power would be general for sales, marriages, and everything else.

A general agency does not authorize the agent to repudiate, unless the appointment be in the most comprehensive terms.

When the appointment is to repudiate a wife once, and the agent gives her two repudiations, it is not lawful, according to Aboo Huneefa, but according to the other two one repudiation takes effect. A man says to another, 'Repudiate my wife revocably,' and he gives her an irrevocable repudiation, one takes effect, but it is revocable; and if the agent should say 'I have separated her,' it would be entirely nugatory. A man says, 'Repudiate my wife before my brother such an one,' and the agent repu-

The agent to repudiate must act according to his instructions.

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diates her without the presence of his brother, the repudiation nevertheless takes effect; in the same way as if he had said, 'Repudiate her before witnesses,' and he should repudiate her without them. When an absent person has been appointed an agent to repudiate, and he repudiates in ignorance of his appointment, the repudiation is void, for an agency to repudiate is not established before the agent is acquainted with it.

When the instructions are subject to a condition.

If a person should say, 'Repudiate my wife so that she is not to take anything away with her from the house,' and the agent says to her, 'I have repudiated thee so that thou art not to take anything away from the house,' and she accepts the terms, repudiation takes place whether she do so or not; but if the agent should say, 'I have repudiated thee on condition that thou art not to take anything out of the house,' and she should, notwithstanding, take something away, there would be no repudiation; and if there should be any dispute as to the fact, the word of the husband would be preferred, because he denies the repudiation.

An agent and messenger are alike.

A man says to another, 'Repudiate this my wife,' and the agent accepts, and the man goes away (is absent), the agent cannot be compelled to repudiate. An agent and a messenger for repudiation are alike. A message to repudiate is when a husband sends a repudiation to his absent wife by the hand of a person, and if the messenger should go to her and deliver the message to her face, repudiation would take effect.

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CHAPTER IV.

OF REPUDIATION WITH A CONDITION, AND THE LIKE.

Preliminary.[1]

Suspension on a condition is a *yumeen*.

To suspend anything, or make it dependent on a condition, is a kind of *yumeen*;[2] and repudiation, when so suspended, is indifferently said to be on condition, or by *yumeen*.

Definition and kinds of *yumeen*.

Yumeen, in its legal acceptation, is an engagement by which a *halif*, or swearer, is confirmed in his resolution to do or refrain from something, and it is of two kinds: the *yumeen* by God Almighty, or his attributes, and the *yumeen* without Him; which is also of two kinds; one, by the patriarchs, prophets, and angels, or the like; and the other by suspending a *juza*, or consequence, on a *shurt*, or condition. The latter kind of *yumeen* is either with *kurb* or approaching,[3] as if one should say, 'If I do so and so, fasting, or prayer, or pilgrimage, or charity, or the like, is incumbent on me; or without *kurb*, as by divorce and emancipation. The pillar of the *yumeen* by God is the mention of God or his attributes, and the pillar of the *yumeen* without God is the mention of a good *shurt* and a good *juza*. A good *shurt* is something that is non-existent, and is contingent, that is, which may or may not happen; and a good *juza* is something the being of which is certain, or, at least, highly probable, on the occurrence

Yumeen by God.

[1] The authorities for this preliminary section, where not otherwise indicated, will be found in the first chapter of the book *Yumeen*. *Fut. Al.* vol. ii. p. 71.

[2] *Kifayah*, vol. ii. p. 221.

[3] Apparently to God.

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of the *shurt*; and this is secured by annexing the *juza* to the right, or power of effecting it, or to the cause of such power, and by its being a matter that may properly be made the subject of an oath; for if it is not so, as, for instance, if it be agency or a licence to trade, as when one has said, 'If thou dost so, I appoint thee my agent,' or, 'license thee to trade,' there is no *yumeen*.

Yumeen without God, or suspension on a condition.

The *yumeen* without God, or by *shurt* and *juza*, is restricted to repudiation, emancipation, and *zihar*;[1] and the following are its conditions. First—every condition that is required in the *halif*, or swearer, for legalizing repudiation or emancipation by him, is required for his effecting them by *yumeen*; and what is not a condition in the one case is not a condition in the other. Second—the matter on which the oath is taken must be in the future; for to suspend on what is actually in being is not to make a *yumeen*, but to expedite or perfect the thing so suspended, or made dependent on it; so that if one were to say to his wife, 'Thou art repudiated if there is a heaven above us,' repudiation would take effect immediately. Third—when repudiation or emancipation is the subject of the *yumeen* it is necessary that the person making it have the power to repudiate or emancipate, or that he should annex the act to his future possession of the power, or to the cause of it. Fourth—with regard to the body of the *yumeen*, what is required in the *yumeen* by God Almighty is required in the *yumeen* without Him; or, in other words, it must be free from *istisna*, that is, from expressions such as—'If God will,' or 'Unless God will,' or 'Unless I see or prefer something else,' or the like. For anything of this sort said in connection with the *yumeen* would prevent it from being contracted; though, if separated from the *yumeen*, it would not have that effect. It is also a condition that nothing shall intervene between the condition and the consequence to interrupt or restrain its operation; for if there should be anything of that kind, there would be no *yumeen*, or sus-

[1] *Inayah*, vol. ii. p. 180.

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pension, but rather an expediting or perfecting of the consequence.

Different kinds of the *yumeen* by God: *Ghumoos*,

The *yumeen* by God is of several kinds. First—the *ghumoos*, which is a designedly false affirmation or denial of something in the past or present; and the person who takes such an oath commits sin, for which he ought to ask pardon and repent.[1] Second—the *lugho*,[2] which is when a person swears to something in the past or the present, thinking that the fact is as he states it, but in truth it is the contrary. For instance, he has said, 'By God, I did so;' when in truth he did not, and only thought that he did; or, seeing one at a distance, he has said, 'By God! that is certainly Zeyd,' when, in truth, the person referred to is Omar. For such an oath the swearer is not accountable, and, when uttered without design, it is not productive of any effect against him, either in this world or the next. Third—the *moonâkudah*,[3] which is when a person swears, with reference to something in the future, that he will or will not do it, and the effect is to induce expiation in the event of a breach.

Lugho,

Moonâkudah.

An oath by repudiation compared with them.

A *hulf*, or oath by repudiation, emancipation, and the like, when taken to a fact in the future, resembles the *mâkoodah*,[4] or contracted *yumeen*; but when taken to a fact in the past, it is neither *ghumoos* nor *lugho*, except in so far that when the *halif*, or swearer, is aware that the fact is contrary to what he has stated, or does not know it to be as he has stated, repudiation takes effect. And this is also the case with *nuzr*;[5] for its effect is to establish and

[1] To avert the terrible consequences in a future state, according to the saying of the Prophet, 'Him who swears falsely God will cause to enter into the fire.' *Hidayah*, vol. ii. p. 474.

[2] Literally, 'rash or inconsiderate.'

[3] Literally, 'contracted,' from *ákd*, a contract.

[4] Another inflection of *ákd*.

[5] The *nuzr* is properly a vow taken for God's sake, to do something that is good, or abstain from something that is evil. A man has said, 'If I recover from this sickness I will sacrifice a sheep,' and he does recover; yet nothing is incumbent on him, unless he had said, 'If I recover, then for the sake of God I am under an obligation to sacrifice.' *Fut. Al.*, vol. ii. p. 92.

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confirm. Thus, supposing a person to say, 'If this be not such an one, I am under an obligation to perform the *hujj*' (or pilgrimage to Mecca), not doubting that he is so, but he proves to be otherwise; the person is bound nevertheless to perform the pilgrimage.

When the *moonâkudah* ought and ought not to be observed.

The *yumeen moonâkudah*, considered with reference to the propriety of observing it, is of four different kinds. The first is one that ought to be observed; and it is where a person has bound himself to do, or refrain from something that he ought to do or refrain from; for here there is a moral obligation already, and it is increased by the *yumeen*. The second is one which it is not lawful to observe; and it is when a person binds himself to abandon a duty or commit a sin. The third is a *yumeen* which it is optional to keep or to break, but better to keep. And the fourth is a *yumeen* which it is also optional to keep or to break, but better to break. With all, however, it makes no difference whether the *yumeen* be taken designedly, or on compulsion, or in forgetfulness; and expiation is due on breach of the oath. If it be asked, How can this be consistently with the definition of a *yumeen*? the answer is, that it might be otherwise by analogy, but for this there is *nuss*, or an express authority, which is a saying of the Prophet.[1] And if a man should do the thing upon which he has sworn, designedly, or under compulsion, or in forgetfulness, it would be all the same; for the occurrence of the condition is a fact which cannot be extinguished by compulsion.

Expiation due in all cases of breach.

The oath 'by God,' should be used with moderation.

It is not abominable to take the *yumeen* by God, but it should be done in moderation:[2] and though to take the *yumeen* without God is accounted abominable by some, it is not so according to the generality of the learned—for no confidence is obtained by it, particularly in 'our' times.[3]

[1] *Hidayah*, vol. ii. p. 477, and *Inayah*, vol. ii. p. 389.

[2] Literally, 'little is better than much.'

[3] The *Kafee* is cited, and it is evident that the author is speaking of the *yumeen moonâkudah*.

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Section First.

Of Conditional Words.

Conditional words in the Arabic.

The following are conditional words, viz. :—*in* (if), *iza* (when), *izáma* (at the time), *kooll* (every), *koolluma* (as often as), *muta* (whenever), *mutuma* (whensoever). *In* is distinguished from the others as expressing nothing but condition, while in the others there is also a reference to time.[1] But with all of them except *koolluma*, when the condition occurs once, the oath is satisfied and at an end, and there is no repetition of the consequence on a recurrence of the condition. When again the oath is contracted with the word *koolluma* (as often as), and repudiation is the *juza* or consequence, it is repeated on every occurrence of the fact or event on which the oath is founded, until there is a complete discharge from the marriage tie to which it was applied. If after such a discharge, as by a marriage with another husband, the parties were to re-marry, and the fact on which the vow was founded should again be repeated, there would be no fresh incurrence of the consequence; unless the word *koolluma* had been applied to the act of marrying, as for instance by a man's saying, 'As often as I marry a woman then she is repudiated,' or 'As often as I marry thee, then thou art repudiated;' whereupon the consequence or repudiation would be incurred on each occurrence of marriage, even after the woman had intermarried with another husband. With regard to the word *kooll* (every), if a man were to say, 'Every woman that I marry is repudiated,' and should marry several, they would all be repudiated; but if he were to marry the same woman several times, she would be repudiated only once. There are some other Arabic words which are used as words of condition, among which are the following:—*luw* (if), *mun* (he who), *ayy*, or in the feminine, *ayyut* (whoso-

[1] *Hidayah*, vol. ii. p. 223.

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ever), *ayyán* (when), and *ayyun* (wheresoever). To which may be added, *fee* (in), when placed before a verb, as in the phrase, 'Thou art repudiated *in* thy entering into the house,' meaning 'if thou enterest.'

Conditional words in Persian.

The words of condition in the Persian language are the following:—*ugur* (if), *hume* and *humesha* (always), *hurgah* (whenever), *hur zuman* (each time), and *hurbar* (as often as). Of these words, the first corresponds to the Arabic *in*, and the consequence is incurred only once; the second and third correspond to the Arabic *muta*, the meaning of both being the same, and the consequence incurred only once; and with the fourth and fifth the consequence is incurred only once, for they correspond to the Arabic *kooll*. But the sixth corresponds to the Arabic *koolluma*, and the consequence is incurred with every repetition of the condition.

Section Second.

Of suspending Repudiation by the words Koolluma *and* Kooll.

Examples of *koolluma*.

When a man has said to his wife, 'As often as you repeat a good sentence then you are repudiated,' and she says, 'Praise be to God,' and 'There is no God but God,' and 'God is most great,' only one repudiation takes place; but if she were to repeat the same formulas without the connective 'and,' she would be repudiated three times. A man having said, 'As often as I enter the house then thou art repudiated, if I speak to such an one,' enters the house several times and then speaks to the person several times, there is a breach of the vow each time. And if he should say, 'As often as I marry a woman she is repudiated if she enters the house,' and then marries her repeatedly and she enters once, she is repudiated three times.

Examples of *kooll*.

When a man has said, 'Every woman that I marry in (*fee*) such a village is repudiated,' and then takes one out

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of it and marries her, she is not repudiated. The result would be the same if, without taking a woman from the village, he should marry one elsewhere. But suppose him to have said, 'Every woman I marry from (*min*) such a village,' and then to marry a woman of the village, he would be forsworn, wheresoever the marriage might take place. A man having said to his parents, 'Every woman I marry,' or 'who may enter into marriage with me' or 'who may become lawful to me while you both remain alive is repudiated,' one of his parents dies, the vow then is void. A man is aware that he has made a vow to repudiate every woman whom he may marry, but does not know whether he was adult at the time or not, and enters into a marriage, his wife is not repudiated, by reason of the doubt. If a man should say, 'Every woman I marry till I marry Fatima is repudiated,' and Fatima dies or is absent, after which he marries another woman, she is repudiated in the case of absence, but not in that of death. If a man should say to his wife, 'Every woman that I marry I have already sold her repudiation to thee for a *dirhem*,' and then marries a woman, whereupon the wife first addressed, as soon as she is made aware of the marriage, says, 'I have accepted,' or 'have repudiated her,' or 'have bought her repudiation,' the woman last married becomes immediately repudiated. But if the wife first addressed should say before the second marriage, 'I have accepted,' there would be no repudiation; for the acceptance would not be valid, as coming before the *eejab*, or declaration. A man having said, 'Every woman I marry is repudiated,' marries one by an invalid contract, and then repeats the ceremony in a valid manner, repudiation takes effect. But if a *fuzolee* or unauthorized person were to marry him to a woman, and he should allow the marriage by his act, as for instance by sending her the dower, she would not be repudiated.

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Section Third.

Of Suspending Repudiation by means of the words In, (*If*), Iza, (*When*) *&c.*

When repudiation is annexed to a condition, it takes effect immediately after its occurrence,

When repudiation is annexed to marriage, it takes effect after the marriage; as if a man should say to a woman 'If I marry thee then thou art repudiated,' or 'Every woman I marry, she is repudiated;' and in like manner as to the words 'when' and 'whenever.' And it makes no difference whether he does or does not specify a particular city, or family, or time. And if he should annex the repudiation to a condition, it would take effect after the condition, by general agreement, as if he should say to his wife, 'If thou enterest the house then thou art repudiated.' The annexing of repudiation is not valid, unless the *halif*, or swearer, has power to repudiate, or annexes it to his possession of the power; and annexing to the cause of the power, as the act of marriage, for instance, is the same as annexing it to the power itself.[1] Thus, if a person should say to a strange woman, 'If thou enterest the mansion, then (*fa*) thou art repudiated,' and should afterwards marry her, and the woman should then enter the mansion, there would be no repudiation; or if he should say, 'Every woman that I congregate with in bed is repudiated,' and should then marry a woman, she would not be repudiated. And if a man should marry a woman on condition that she is repudiated, there would be no repudiation. But if he should say to a strange woman, 'If I marry thee, then thou art repudiated,' and he should marry her, repudiation would immediately take place.[2]

if there is power to repudiate,

and the condition is express.

Suspension by an express condition, that is, by the employment of a conditional particle, takes effect on a woman that is particularized, and on one that is not particularized;[3] while suspension by the meaning of a condition affects a woman that is not particularized—as when

[1] See *ante*, p. 260.

[2] *Hidayah*, vol. ii. p. 220.

[3] As in the last case.

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a man says, 'The woman that I marry, she is repudiated;' but does not affect one that is particularized, as if he should say, 'This woman that I marry is repudiated,' and should then marry her, when there would be no repudiation.

A diminution of the power before the occurrence of the condition does not invalidate the repudiation,

After a conditional repudiation has been given, it is not necessary that the right to repudiate should remain entire and perfect, until the occurrence of the condition; so that a decline in the right, as, for instance, by the swearer's giving one or two unconditional repudiations in the meantime, would not cancel it: and if the condition, when it occurs, still finds the woman under the power (though partially reduced) of her husband, the vow is paid. Thus, if a man should say to his wife, 'If thou enterest the mansion, then thou art repudiated,' and should repudiate her before the occurrence of the condition, and she should then enter the mansion, being still his wife (that is, in her *iddut*), the conditional repudiation would take effect, and nothing remain of the vow. But if the occurrence of the condition should find her out of his power, and the vow should be paid,—as, for instance, if he had said to his wife, 'If thou enterest the mansion, then thou art repudiated;' and should then repudiate her before the occurrence of the condition, and the *iddut* should expire, and she should then enter the mansion, whereupon the vow would be paid,—no repudiation would take effect. And if he should say to his wife, 'If thou enterest the mansion, then thou art repudiated thrice,' and should repudiate her once or twice before her entrance, and she should then intermarry with another husband, and the marriage be consummated, after which (being released from him by his death or otherwise), she should return to her first husband (by re-marriage) and then enter the mansion, the three original repudiations would, on this occurrence of the condition take place, according to Aboo Huneefa and Aboo Yoosuf. But if, after the conditional repudiations, whether three or under, she were thrice repudiated, instead of once or twice, before her entrance into the mansion, and should then return to and be re-

but an entire exhaustion of the power has that effect.

So also an exhaustion of the *yumeen* before the

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occurrence of the condition.

married to her first husband, after such marriage had been legalized by intermarrying and consummating with another husband, and should then fulfil the condition by entering into the mansion, nothing would ensue; because suspended repudiations, whether three or more, are neutralized and invalidated by three given subsequently, which extinguish the whole of the matrimonial right.

When the consequence is the antecedent, the particle *fa* (then) need not be introduced.

But it must if the condition is the antecedent.

When the *shurt*, or condition, is placed after the *juza* or consequence, the relation between them is validly established without prefixing the particle *fa* (then), as in the example—'Thou art repudiated if thou enterest the mansion,' and repudiation immediately follows the entrance. But if their places be reversed, and the conditional proposition be made the antecedent, it is necessary to prefix the particle *fa* to the affirmative whenever it begins with a noun (*ism*), as in the example, 'If thou enterest the mansion, *then* thou art repudiated;'[1] for if the *fa* were omitted, the dependence would not be established, and, there being nothing to qualify the repudiation, it would take effect on the instant, unless he should say that he meant it to be suspended; and even then his assertion would be good only in conscience, and could not be admitted in a court of law. If, however, the affirmative proposition should begin with a verb, whether in the past or future time, its dependence on the conditional would be sufficiently established without any necessity for prefixing *fa*.[2]

Repudiation takes effect immediately when suspended on an existing fact,

and never when on an impossibility.

If a man were to say to his wife, 'Thou art repudiated, if the heaven be above us,' or 'if this be the day,' or 'if this be the night,' when it is the day, or the night respectively, repudiation takes place on the instant: for this is to confirm, not to suspend on a condition, which always implies that something is not to take place on the non-happening of something else, while here the something else is actually in existence.[3] And if a person should say, 'If a camel enter the eye of a needle, then thou art repu-

[1] Arab *Talik*, which is an *ism* or noun.

[2] This is a rule of Arabic grammar.—De Sacy, tom. ii. p. 396.

[3] See *ante*, p. 260.

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diated,' there is no repudiation; for that is to confirm a negative, the thing on which the condition is suspended being plainly impossible.[1] A man says to his wife, 'If you do not restore to me the *deenar* which you took from my purse, then you are repudiated,' and lo! the *deenar* is in his purse, no repudiation takes place. A drunken man knocks at the door, and the door not being opened, says, 'If thou dost not open the door this night, then thou art repudiated,' and there being no one in the house, the night passes without the door being opened, yet there is no repudiation. A man being absent from his house an hour, returns, and supposing his wife to be absent, says, 'If she is not brought to my house this night, she is repudiated thrice,' but on the morning appearing, the wife says, 'I was in the house,' there is no repudiation.

How its incidence is determined when the condition is an existing fact that may occur again.

When a man has said to his wife, 'If you are in your courses,' or 'if you are sick, then you are repudiated,' she being as indicated at the time, the repudiation has reference to a future occurrence, unless he intended that it should have reference to her actual condition at the time; in which case it would be as he intended. But suppose when he has said to her, 'If you are in health, then you are repudiated,' she being well at the time, then repudiation takes effect on the instant of his being silent, that is, of the present time. So also when he has said, 'If you see, if you hear, then you are repudiated,' she both seeing and hearing at the time, repudiation takes effect on the instant. 'Standing,' 'sitting,' 'riding,' and 'dwelling,' however, require to be prolonged for a little before the repudiation can take effect, and 'entering' and 'going out' must be understood as of the future. Pregnancy, in like manner, as when a man has said to his wife, 'If you are pregnant, then you are repudiated,' she being so at the time, must be understood as of a future pregnancy. So also, 'beating' and 'eating' must be referred to future occurrences of the act.[2] If he should say, 'When you have your courses,

[1] *Ante*, p. 260.

[2] The distinction between the cases seems to be that in the one set the existing fact is incidental, in the other it is the normal condition.

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then you are repudiated,' repudiation would not take effect till they had continued for three days, for what ceases within that time is not accounted the courses; but when the three days are completed 'we' give effect to the repudiation as from the time of their commencement.

Dispute between husband and wife as to the occurrence of the condition.

If the parties should differ as to the occurrence of the condition, the word of the husband is preferred; except as to a matter within the wife's knowledge, and which cannot be known without her, when her word is to be preferred, so far as concerns herself. Thus, if a man should say to his wife, 'If your courses are on you, then you are repudiated and such an one;' or 'If you love me, then both are repudiated,' and she should say, 'They are on me,' or 'I do love you,' she would be repudiated alone; except that, in the case of the courses, if she gave the information while they were actually on her, her word would be taken to the full extent; and it is only when her husband does not know the fact that there is any reserve as to her word; for if he should know it, her co-wife would be repudiated also. And if a man should say to two wives, 'When you both have had your courses, then you both are repudiated and they reply, 'We have already had them,' and he believes the assertion, they are both repudiated; while if he disbelieves them, they are not; but if he believes one and disbelieves the other, the latter is repudiated and not the former; all that is required being found in her case; for each of them is a declarer or acknowledger against herself, and a witness against the other, and is therefore to be believed as against herself, though not entitled to credit with respect to the other. When, therefore, the husband believes one of them, both the requisite conditions are satisfied with regard to the one whom he disbelieves, by her information against herself, and by his assent to the testimony of the other against her, while only one of the conditions is satisfied with regard to the one whom he believes.

Case of repudiation placed on two conditions.

When there are two parts to a condition, as when a man has said to his wife, 'If you enter the mansion of Zeyd and the mansion of Omar,' or 'If you speak to Omar and Aboo Yoosuf, then you are repudiated,' it is a condition of repudiation taking effect that the last of the facts should

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occur while she is still under his power; so that if he should subsequently repudiate her after thus suspending her repudiation on two conditions, and her *iddut* should expire and one of the conditions should then take place, she being now irrevocably divorced, and he should after this remarry her, and the remaining condition should then take place, the suspended repudiation would take effect. Zoofr, however, disputed this, and the case presents four phases: first, both conditions may occur while the woman is under the husband's power, and here the repudiation would take effect, by general agreement; second, both may occur while she is not under his power, and repudiation would not take effect, also by general agreement; third, the first condition may occur while she is under his power, and the second when she is not under his power, and here also there would be no repudiation; and fourth, the first may occur while she is not under his power and the second while she is, and this phase is the case above stated on which there is the difference of opinion.

Miscellaneous cases.

A man says to his wife, 'If this night you do not come near me, then you are repudiated,' and she comes to his door but does not enter, repudiation takes effect; but if she should enter his apartment while he is asleep she would not be repudiated; and the condition of coming to him would be satisfied by her coming within reach of his arm. A woman being asleep on her own couch, her husband calls her to his, and on her refusing, he says, 'If you do not come this night to my bed you are repudiated,' after which he himself brings her forcibly to his bed in such a manner that her feet do not touch the ground, and she sleeps with him for the night, repudiation does not take effect. A man says to his wife, 'If you complain of me to your brother you are repudiated,' whereupon her brother comes, and with him a boy who does not understand, and the woman says, 'O boy, my husband has done to me so and so,' her brother hearing what is said, she is not repudiated, as she addressed the boy and not her brother.

A woman takes a *dirhem* from her husband's purse and buys meat with it, and the butcher mixes the *dirhem* with other *dirhems* of his own, but the husband having said to

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his wife, 'If you don't return that *dirhem* to me to-day you are repudiated three times,' and the whole day passes without the *dirhem* being returned, repudiation takes effect. The proper device in this case would have been for the woman to take the butcher's purse and deliver it to her husband, which would have satisfied his oath.

When the condition is doing something without permission.

When a man has said to his wife, 'If you go out from this mansion without my permission, then you are repudiated,' and he gives the permission in Arabic which she does not understand, but goes out, repudiation takes effect. And this is a precedent for permission given to one who is asleep or absent; the principle being, that permission given to one who does not hear it, is not permission; so that when the wife goes out after such a permission she is repudiated, according to Aboo Huneefa and Moohummud. And when a man has said to his wife, 'You are repudiated if you go out without my order (*amr*),' there is no order unless it is communicated to her by himself or by a messenger from him; insomuch that though he should call upon several persons to bear witness that he had given the order yet there would be none; and if those persons should communicate it to her, but without being desired by him to do so, and she should go out, she would be repudiated; while if he had directed them to communicate the order to her, and they had done so, and she had then gone out, there would be no repudiation. If, however, instead of order, the words 'good pleasure' (*iradut*), 'will' (*huwa*), 'satisfaction' (*ruza*), had been used, there would be no necessity for her hearing them, and if she should go out after he had actually said, 'I am satisfied,' she would not be repudiated, though she did not hear them delivered. When a man has said to his wife, 'You are repudiated if you go out *except* with my permission, "satisfaction," or "knowledge,"' or 'You are repudiated if you go *without* my permission, "satisfaction," or "knowledge,"' the expressions amount to the same thing, there being no real difference between *except with* and *without*. But with either expression the oath is not at an end upon one permission being given; so that if he should give her

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permission to go out once, and she should avail herself of it, and then go out another time without his permission, she would be repudiated. And this is a precedent for the case of a man saying to his wife, 'If you go out from this mansion without the *milhafah* you are repudiated,' whereupon, if she go out without it, repudiation takes effect. The device for avoiding the consequence, is for him to say, 'I give you permission to go out at all times,' or 'as often as you go out,' or 'as often as you please to go out I permit you,' or 'I permit you to go out for ever' or 'always,' and he might still give her a general prohibition afterwards, and the prohibition according to Moohummud would be good, the *futwa* also being in accordance with his opinion.

Subsistence of the power to refuse permission is necessary to a breach of the oath.

A man swears by the repudiation of his wife that she will not go out without his knowledge, and she goes out under his eye, it matters not whether he forbid her or not, there is no breach of the oath.[1] And if a man should make his wife swear by her repudiation that she will not go out of the mansion except with his leave; or if the Sultan should make a man swear by the repudiation of his wife that he will not go out of the city without his leave; or if a creditor should make his debtor swear that he will not go out of the city without his leave, the *yumeen* is restricted in the first case to the subsistence of the marriage, in the second to the continuance of the Sultan's authority, and in the third case to the subsistence of the debt; so that, if the wife should become irrevocably repudiated, or the Sultan be deposed, or the debt cease to be due, the *yumeen* would fall to the ground and never revive, though the husband or the Sultan should regain his power, or the creditor be reinstated in his former position.[2]

A man sues another for a thousand *dirhems*, and the

[1] This properly is not a *hulf* by repudiation, which, like the *moondkudah yumeen*, has reference to something to be done or not done by the swearer himself. See *ante*, p. 261.

[2] These being examples of *hulf*, the consequence of a breach could only be expiation, as in the case of the *moondkudah yumeen*. See *ante*, p. 261.

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Case of oath by repudiation to a fact that is otherwise than as stated.

defendant says, 'My wife is repudiated if I owe you a thousand *dirhems*,' whereupon the plaintiff replies, 'If you do not owe me a thousand *dirhems*, then my wife is repudiated;' after which the plaintiff adduces proof of his right, and the judge decrees in his favour, and makes a separation between the defendant and his wife. This is agreeable to a saying of Aboo Yoosuf, and according to one of two reports of Moohummud's opinion; and the *futwa* accords with it. But if after this the defendant should adduce proof that he paid the plaintiff a thousand *dirhems* before the suit was brought, the judge must cancel the separation between the defendant and his wife, and the plaintiff's wife would become repudiated if he meant that he had no other claim against the defendant except for the thousand *dirhems*.[1] If the plaintiff, instead of adducing proof to the actual debt of the defendant, should adduce it to an acknowledgment by the defendant of a thousand *dirhems* being due by him, some say that the judge ought not to separate between the defendant and his wife; but 'our' master has said it is difficult to allow this, for what is established by proof is what is established by seeing and hearing; and if the judge had been present at the acknowledgment by the defendant of a thousand *dirhems* being due by him to the plaintiff, he must have made the separation between the defendant and his wife.[2]

Miscellaneous cases where the occurrence of the condition is in question.

A man having said, 'If I lie my wife is repudiated,' and being questioned as to a fact, nods his head to what is a lie, he is not forsworn, however, until he speaks falsely.

When a man has sworn by the repudiation of his wife that he will not drink of any intoxicating liquor, and some is poured down his throat, and enters his stomach, if the entrance is effected without any act of his own, he is not

[1] Though put into the form of a condition, this properly is not a case of *yumeen*, which requires a fact in the future, but of *hulf* by repudiation; and as the party must be presumed to know whether he is in debt or not, or, at least, is ignorant with regard to the fact, repudiation takes effect. See *ante*, p. 261.

[2] By proof, is to be understood the testimony of witnesses.

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forsworn; but if he retain the liquor in his mouth, and then drink it, he is forsworn. And when a man has said to his wife, 'If I drink, then thou art repudiated,' and his wife adduces one man and two women who testify to his drinking wine, their testimony cannot be received either with reference to the *hudd*, or specific punishment for the offence, or to the repudiation; but it has been said that it ought to be received as to the latter, and this is approved for the *futwa*. A man said to his wife, 'If such an one has repudiated his wife, then thou art repudiated thrice,' and the person alluded to being absent, the wife of the swearer offers proof of his absence, and that he has repudiated his wife, but according to Aboo Nusr the proof is not to be received, and this is correct.

Some miscellaneous expressions and their effect.

A man says to his wife, 'Enter the mansion, and thou art repudiated,' and she enters, repudiation takes effect, for the 'and' is here equivalent to the particle *fa*. A man says, 'Whatsoever (*ayyuto*) woman I marry she is repudiated,' this is restricted to a single woman, unless he meant a number. But if he should say, 'Whatever (*ayyuto*) woman marries herself to me she is repudiated,' the expression would comprehend all the women he might marry. If a man should say, 'The first woman I marry she is repudiated,' and should marry a woman, she would be repudiated, though he should never marry another. But if he were to say, 'The last woman that I marry, she is repudiated,' and should marry one woman and then another, repudiation would not take effect on the latter till his death, and then it would have a retrospective effect as from the time of the marriage, according to Aboo Huneefa; but according to the other two its effect would be restricted to the present time.

Section Fourth.

Of Istisna *or Exception.*

Meaning of *istisna*.

Istisna means literally 'to except,' but with every exception there is a remainder, of which something is said after the exception, and it is to this speaking with reference

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Applied to the words, 'If God will.'

to the remainder that the term *istisna* is more properly applied. In the Koran, however, the formula 'If God will' is also termed *istisna*, and this being in form a suspension, or conditional,[1] *istisna* is treated by writers on Moohummudan law in connection with repudiation on condition or by vow.

Repudiation does not take effect when followed by these,

When a man has said, 'Thou art repudiated if God Almighty will,' the latter words being in juxtaposition to the former, repudiation does not take effect,[2] even though the woman should die before he has uttered the words, 'if God will.' On the other hand, if the man were to die before uttering the words, but intending to have done so, repudiation would take effect, and his intention might be known by his having said previously, 'I will repudiate my wife and except.' If he should have said, 'except if God will,' or 'when God will,' the effect would be the same as of the words 'if God will.' And if he should say, 'Thou art repudiated if God has not willed,' there would be no repudiation, unless he were to give a limit of time, as 'to-day,' in which case, when the day had passed, she would be repudiated by virtue of the *yumeen*. And if his words were 'if God desire,' or 'be satisfied,' or 'intend' there would be no repudiation. So, also, if the words were 'with the will,' or 'decree,' or 'intention of God;' there being in all these cases either a nullification, or a suspension on what is an unfit basis for a condition, in the same way as when the words are 'if God will;' for the particle *ba* (with) is of equal efficiency in connecting the *juza* with the *shurt*, as if the one were suspended on the other.

or words of the like import.

When repudiation is suspended, or made dependent on the will of one whose will is not a fit basis for it, as when one has said, 'If Gabriel,' or 'the angels,' or the

[1] *Inayah*, vol. ii., p. 189.

[2] Because the Prophet has said, 'Where a man makes a vow of divorce or manumission, saying, *If it please God*, he cannot be forsworn,' and because, the words being in the form of a condition, the divorce is suspended on the will of God, and does not take place till the occurrence of the condition, which being unknown, nothing suspended on it can be decreed. *Hedaya*, vol. i., p. 271.

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'genii,' or 'the devils will,' it is the same as suspension on the will of God; and if one should join the will of God and the will of mankind, as by saying, 'If God will and Zeyd will,' there would be no repudiation, though Zeyd should declare his will to that effect; because the suspension is on two conditions, one of which is unknown; and when this is the case the consequence does not follow on the occurrence of only one of the conditions.

Different reasons assigned for this.

To suspend anything on the will of God is to extinguish and nullify it according to Aboo Huneefa and Moohummud; while, according to Aboo Yoosuf, it is to suspend it on a condition, but one that is incapable of sustaining it; and, consequently, it does not take effect, in the same way as it would be without effect if suspended on the will of an absent person; and hence, also, the necessity for connection with the condition, as is required in all conditions. The fruit of this difference of opinion appears in the following cases:—1st. When the condition is placed first and the consequence follows without the intervention of the particle *fa*, as by one's saying, 'If God will, thou art repudiated;' for here, while there is no repudiation according to the two, it takes effect according to Aboo Yoosuf.[1] 2nd. When there is a combination of two vows, as by one's saying, 'Thou art repudiated if thou enterest the mansion, and my slave is free if thou speakest to Zeyd, if God will,' the *istisna* is confined to the second sentence, according to Aboo Yoosuf (because the first is complete with respect to suspension[2]), but extends to the whole in the opinion of the other two (because, though the first is complete with respect to suspension, it is defective in so far as it is connected with that which nullifies it[3]); while if it were applied to two consequences, as for instance if the husband should say, 'Thou art repudiated and my slave is free, if God will,' it would extend to the whole according to all their opinions. When again the particle *fa* is interposed, as for instance, when the man

Fruit or effect of the difference.

When the case is not affected by the difference.

[1] Because there is no suspension for want of the particle *fa* before the pronoun. See *ante*, p. 268.

[2] *Kifayah*, vol. ii., p. 233. [3] *Ibid.*

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has said, 'If God will, then (*fa*) thouart repudiated,' she would not be repudiated, according to all their opinions. And if the repudiation were placed first by the saying, 'Thou art repudiated and (*wa*) if God will,' or using the same words with *fa* instead of *wa* there would be no *istisna*. And suppose one to say 'Thou art repudiated, if God will, if thou enter the house,' repudiation would not be suspended on entering the house, the *istisna* being here a separation between the consequence and the condition. But if he should have said, 'Thou art repudiated if God will, thou art repudiated,' the *istisna* would have reference to the first, and the second would take effect.

Other examples of *istisna* or exception.

If a man should say to his wife, 'Thou art repudiated three times except one,' she would be repudiated twice; and if he should say 'except two,' she would be repudiated once. An exception of the whole from the whole, if made in express terms, would not be valid, but if made only in meaning or by inference it would. Thus, if a man were to say, 'All my women are repudiated except all my women,' no effect would be given to the exception, and all would be repudiated; but if he were to say, 'All my women are repudiated except Zeinub, and Amrut, and Bukrut, and Sulma,' effect would be given to the exception, and not one of them would be repudiated. So also if his words were, 'All are repudiated except these,' and he had none other besides them, the exception would be valid, and not one of them repudiated.

Conditions of validity.

It is a condition to the validity of an exception, that it be joined to the preceding sentence in the absence of any necessity to the contrary; so that if they be unnecessarily separated by a pause or the like, the exception is not valid; but a pause to take breath does not invalidate it, unless there is positive silence. And if he should sneeze or belch, or by reason of a heaviness in his tongue should hesitate, before uttering the words 'if God will,' the exception would be valid. But not so if after saying, 'Thou art repudiated,' the words 'if God will' should slip from his tongue without design, for then it would not take effect.

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CHAPTER V.

OF REPUDIATION BY THE SICK.[1]

A revocable repudiation has no effect on the inheritable rights of husband or wife, when death occurs during the *iddut*;

WHEN a man has given his wife a revocable repudiation, whether it were given in health or in sickness, or with or without her consent, and either of them[2] happens to die before the expiration of her *iddut*, they are reciprocally entitled to inherit[3] without any difference of opinion.[4] And though the woman were a *Kitabeeah* or a slave at the time of the repudiation,[5] yet if she should embrace the faith, or be emancipated, while still in her *iddut*, she would be entitled to share in his inheritance.

nor an irrevocable repudiation on the rights of the wife, when it is given during the husband's death illness;

When a man in his death illness has repudiated his wife irrevocably, or given her three repudiations, and has then died while she is still in her *iddut*, she inherits from him in like manner according to 'us;' but if her *iddut* should expire and he were then to die, she would not inherit.[6] And if the repudiation were given in health or in an illness from which he recovers, she would not inherit. Shafei maintained that in both cases, that is, whether the death take place before or after the expiration of the

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[1] Death sickness is meant.

[2] Literally he, but either is evidently implied.

[3] A husband is entitled to half his wife's estate when there is no son or child of a son, and to a fourth when there is either; the wife's share in her husband's estate is half of his share in her estate under the like circumstances.

[4] Because the effect of the marriage continues in every way until the expiration of the *iddut*. *Inayah*, vol. ii., p. 191.

[5] Difference of religion and slavery are among the impediments to inheritance.

[6] *Inayah*, vol. ii., p. 191.

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iddut, she is alike without any right of inheritance, because the conjugal relation, which is the basis of the right, is cancelled by the supervening repudiation, for which cause it is that, if she were the person to die, her husband does not inherit from her. According to 'us,' however, the cause of her right to inherit is in the death illness,[1] and as the husband designs to defeat it, his device ought to return to himself, by postponing the effect of his act till the expiration of the *iddut*, to prevent the injury which would otherwise fall upon her; and this can be done, because the marriage lasts for some purposes, such as maintenance, and the prevention of another marriage in some circumstances, &c., and may therefore be supposed to last for the purpose of inheritance also; but that would be impossible after the expiration of the *iddut*. And to meet the argument drawn from the husband's having no right to inherit from his wife in the event of her death during his sickness, 'we' insist that the continuance of the conjugal relation can be no cause of right to him, because the rupture of it is with his own consent.[2] Repudiation by a man in his last illness is termed the repudiation of a *farr*, or evader.[3] When it has been said that a woman irrevocably or three times repudiated retains her right of inheritance until the expiration of her *iddut*, it is assumed that the repudiation is without a request on her part; for if he had repudiated her at her own request she would have no right of inheritance, unless she were compelled to ask for it, when her right would not be invalidated. In th case, that is, of irrevocable repudiation during a death illness, competence on her part to inherit must exist at the time of repudiation and continue till the husband's death. So that if a woman were a *kitabeeah* or an absolute slave when irrevocably repudiated by her husband during his illness, and she should then embrace the faith or be emancipated, she would have no share in his inheritance; and if a sick

unless it were given at her own request.

[1] That is, the heirs have then an inchoate right.

[2] *Hidayah* and *Kifayah*, vol. ii., p. 237–8.

[3] *Inayah*, vol. ii., p. 191.

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man were to repudiate his wife three times, and she should then apostatize, but subsequently return to the faith, and he should then die while she is still in her *iddut*, she would not inherit.

When a man has apostatized from the faith, and has been put to death, or has joined himself to the *dar ool hurb*, or has died in his apostasy within the Mussulman territory, his wife inherits from him. But if a woman should apostatize and then die, or join herself to the *dar ool hurb*,[1] and her apostasy had taken place while she was in health, her husband would have no share in her inheritance, while, if it took place in sickness, he would inherit, on a favourable construction of law. And if they should both apostatize together, and one of them should then return to the faith and then die, the apostate survivor would not inherit;[2] but if the apostate should die, being the husband, the *Mooslim* wife would inherit; while if the wife were the apostate, and she should die, it is only in the case of her apostasy having occurred in sickness that the *Mooslim* husband could inherit; for if it took place in health he would have no claim.

Similar effect of apostasy.

When the son of a sick man has had carnal intercourse with his father's wife against her will, she does not inherit;[3] unless it were at his father's instigation, when the act of the son would be tantamount to the act of the father, and the latter would be a *farr*, or evader of his wife's right. But if the sick man should first repudiate his wife three times, and his son should then have carnal intercourse with her, or should kiss her with desire, she would inherit. So, also, if after the triple repudiation by her sick husband she should kiss his son, and the husband then die, leaving her in her *iddut*, she would retain her right of inheritance.[4]

Effect of other acts that would illegalize the intercourse of the parties.

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[1] She is not liable to capital punishment, but this is civil death, which opens her succession to her heirs generally.

[2] An apostate is incapable of inheriting to anyone.

[3] Because it illegalizes her future intercourse with her husband, and is a cause for dissolving the marriage, which is the basis of her right of inheritance.

[4] Because the acts referred to are in themselves no impediments to

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And if a sick woman should submit to the embraces of her husband's son, and then die during her *iddut*, the husband would inherit on a favourable construction.[1]

What amounts to a request for repudiation on the part of the woman.

If a woman should say to her husband, 'Repudiate me revocably,' and he should repudiate her three times or once irrevocably, she would inherit. But if he should say to her in his sickness, 'Thy business is in thy hand,' or 'choose,' and she should choose herself; or if he were to say to her, 'Repudiate thyself three times,' and she were to do so; or if she should obtain her release by *kloolâ*, and her husband should then die while she is still in her *iddut*, she would not inherit. But if she were first to repudiate herself three times, and he were then to allow or render it lawful, she would inherit, because it is his allowance that nullifies the right of inheritance.

Death illness, and what is evasion by a man.

When a man has repudiated his wife in his illness, and has then recovered but afterwards died, she does not inherit. Evasion is established as soon as a woman begins to have a right in her husband's property; and this takes place on his falling sick of an illness that will probably terminate in death. It is correct to say that, when a man is unable to go out of his home for his necessary avocations, he is sick, whether he can stand up in the house or not; for it is not every sick man that is disabled from standing up in the house for the necessary calls of nature. When a woman is unable to rise for the purpose of sitting on a seat, she is deemed to be sick—otherwise not. Evasion may also be established by other causes which come within the meaning of disease, if death be imminent; but if the chances are in favour of escape, the person is to be accounted as one in health. So that one is not an evader though he were surrounded by the enemy, or in the line of battle, or in a place abounding with beasts of prey, or on board ship, or in prison under sentence of retaliation or stoning; because, in all these cases, a way

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inheritance, and they can have no bearing on the right, through its cause, marriage, because that no longer exists.

[1] She being here the *farr*, or evader.

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of escape may be found by some means or other. But if the ship, on board of which he was, has actually gone to pieces, and he is left floating on a plank; or if he were actually in the mouth of the beast of prey, he would be an evader. A lame man, and one who is paralytic, are to be accounted as sick while the lameness or the paralysis is increasing, but when they have lasted long and are not increasing, he is as one in health. A man with a wound, or other pains that do not make him take to his bed, is also as one in health. A man who is compelled to repudiate his wife is not an evader, if the compulsion be by threats of death; but if only by imprisonment or duress he is.

Evasion by a woman.

A woman may be an evader as well as a man, by giving cause for separation; as, for instance, by exercise of the option of puberty or emancipation, or by submitting to the embraces of her husband's son, or by apostasy or the like, after she has fallen sick; and in such cases her husband would be entitled to inherit. When a separation is made between a sick woman and her husband, by reason of impotency, as, for instance, when the year which has been given to him has expired without their coming together, and she makes her choice to be free, and then dies within the *iddut*, the husband does not inherit from her. And when he has slandered her, and they mutually take the *lián* or imprecation, she being sick at the time, and the judge decrees a separation, and she dies, being still in her *iddut*, the husband does not inherit. When a separation has taken place for impotence or *jub* during the sickness of the husband, and he dies in her *iddut*, she does not inherit, by reason of her assent to the separation. But if a husband should slander his wife in his illness, and take the *lián* against her in his illness, she would inherit according to all their opinions; and though the slander were in health, and the *lián* only in sickness, she would still inherit, according to Aboo Huneefa and Aboo Yoosuf. And if he should take the *eela*, or vow of abstinence, against her in sickness, and the period of the *eela* should expire in his sickness, she would inherit if his death should take place during

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the continuance of the *iddut*; but if the *eela* had been taken in health and its period should expire in illness, she would not inherit.

Effect of a sick man's declaration that he had repudiated his wife in health, and an acknowledgment of debt or a legacy in her favour.

If a man should say to his wife during sickness, 'I repudiated thee three times in health, and thy *iddut* has expired,' and she should assent, and he then acknowledges a debt to her, or bequeaths a legacy to her, she would be entitled, according to Aboo Huneefa, to whichever is the less of the debt or legacy, and her share in the inheritance; but according to the other two, the acknowledgment of debt and legacy would be lawful. If he should repudiate her three times in his illness by her own desire, and should then acknowledge a debt to her or bequeath her a legacy, she would be entitled to whichever might be the less of this, and her share of the inheritance, according to all their opinions. She would be entitled to the less of the two, according to 'us,' if her husband should die during the subsistence of the *iddut*, but if his death did not take place till after its expiration, she would have the amount acknowledged.

Wife's word to be preferred in a dispute with heirs.

If a woman should say, after her husband's death, 'He repudiated me three times during his illness, and then died, I being still in my *iddut*, and I am entitled to my share in his inheritance;' and the heirs should say, 'He repudiated thee in health, and thou hast no right,' her word would be entitled to credit. If a man should say to his wife, in his illness, 'I repudiated thee three times while I was yet in health,' or should say, 'I had connection with the mother or daughter of my wife,' or 'I married her without witnesses,' or 'there was fosterage between us before the marriage,' or 'I married her in her *iddut*,' and the woman should deny these allegations, she would be irrevocably repudiated, but retain her right of inheritance. Whereas if she admitted them she would have no right.[1]

General principle

When a man has said to his wife, he being in health at

[1] This would be equivalent to an assent on her part to the repudiation (as in the cases on the next page), which would bar her right to inherit. See *ante*, p. 280.

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the time—'When the beginning of the month has come,' or 'When thou hast entered the house,' or 'such an one has entered it, thou art repudiated;' and the occurrences take place at a time that he is sick, she does not inherit; but if the words were uttered in sickness, she would inherit in all the cases, except where the condition was, 'if thou enterest the house.' When repudiation is suspended on a condition, and the condition is an act of the husband's own, regard is to be had to the time of its taking place, and if he should then be sick and she in her *iddut*, she would inherit, whether the suspension had been made in health or in sickness, or the occurrence were avoidable or not. But when the suspension is on the act of a stranger, the time when the suspension was made, and the time of the occurrence of the act, are both to be taken into consideration. And if the husband were sick at both the times the wife would inherit, otherwise not, whether the event were avoidable or not; as if he should have said, 'When such an one has arrived,' &c. And the result would be the same if the suspension were on anything in the course of Providence, as the coming of the first of the month, or the like. If the suspension were on some avoidable act of the wife, she would not inherit, whether the suspension and the act should both take place during the husband's sickness, or the suspension in his health and the act in his sickness; and if the act be one of necessity to her, such as eating, drinking, sleeping, praying, fasting, and both the suspension and the act should occur in his sickness, she would inherit, according to all their opinions. And if the suspension were in his health, and the act in his sickness, the rest would be the same, according to Aboo Huneefa and Aboo Yoosuf, in the same way as if the repudiation had been suspended on an act of his own.

as to suspended or conditional repudiations.

When a sick *Mooslim* has said to his *kitabeeah* wife, 'When thou becomest *Mooslim* thou art repudiated three times,' and she embraces the faith, after which the husband dies, he is an evader.[1] If the woman were free, and

Miscellaneous cases.

[1] Difference of religion is an impediment to inheritance, and he is trying to prevent its removal.

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a *kitabeeah*, and the husband should say to her, 'Thou art repudiated three times to-morrow,' and she then embraces the faith, whether before or after the morrow, she has no share in his inheritance; but if she should have embraced the faith and were then repudiated three times, the husband being in ignorance of her having done so, she would inherit. And when the wife of an infidel has embraced the faith, after which he has repudiated her three times, he being ill at the time, and has then embraced the faith himself, and subsequently died while she is still in her *iddut*, she does not inherit. So, also, when a slave has repudiated his wife in his sickness, and then got his emancipation, and acquired property, she has no right to inherit.

Case of a commission to repudiate acted upon in illness.

When a man in health has committed the repudiation of his wife to a stranger, and the stranger repudiates her in sickness, and the commission were of such a nature that it could not be withdrawn, she would not inherit; as, for instance, when he has invested him with the right of repudiation.[1] But if the commission were of such a nature that it could be withdrawn, as if the person were appointed an agent to repudiate, and the repudiation were given in sickness, she would inherit.

[1] For a fixed time. See *ante*, p. 246.

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CHAPTER VI.

OF 'RUJÂT,'[1] OR RETAINING A REPUDIATED WIFE, AND OF WHAT LEGALIZES A REPUDIATED WOMAN TO HER HUSBAND, AND MATTERS CONNECTED THEREWITH.

Definition.

RUJÂT is defined to be the maintaining of a marriage in its former condition while the wife is still in her *iddut*. When a man has repudiated his wife by one revocable repudiation, or by two repudiations, he may retain her while she is still in her *iddut*, whether she be willing or not, according to the sacred text, 'Hold them with humanity;' in which there is no distinction between willingness and the absence of it, or, in other words, without making willingness a condition.[2]

Two kinds of *rujât*:

Rujât, or retention, is of two kinds: *Soonnee*, or according to the traditions; and *Budâee*, or irregular. The

Soonnee

Soonnee form is when a man retains his wife by speech, calls on witnesses to attest the fact, and intimates it to her; if, then, he should retain her by speech, as, for instance, by saying, 'I have retained thee,' or 'have retained my wife,' without calling upon witnesses to attest what he has done, or though he should call upon them to do so, yet if he fail to give his wife intimation, the *rujât* is *Budâee*, or irregular, and contrary to the Sonnah, or traditions, but still valid. And if he were to retain her by deed, as by having intercourse with her, or kissing her with desire, or looking on her nakedness with desire, it would still be a

and *Budâee*.

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[1] The word is also written with a *kusra* (i) in the first syllable, but *futha* (u) is better. *Inayah*, vol. ii., p. 196.

[2] *Hidayah* and *Kifayah*, vol. ii., p. 248.

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retention with 'us,' but abominable; and he ought afterwards to retain her, with a proper calling on witnesses to attest the fact.

It may be effected by words

The words of *rujât* are either *sureeh* or *kinayát*, that is, as before explained, express or ambiguous. The express are, when addressing herself, 'I have returned to thee,' or when speaking to another 'My wife is recalled';[1] and among them are also, 'I have brought thee back,' or 'have retained thee,' or 'restored thee.' The ambiguous are, 'Thou art to me as thou wert,' or 'art my wife,' and these are not sufficient without intention. If he should retain her by words of marriage, it would be lawful, according to Moohummud, and the *futwa* is to the same effect; and thus, when he has married her, he is accounted to have returned to her. And if he should say, 'I have married thee,' it would be a *rujât*. When he has said, 'I have retained thee for a dower of a thousand *dirhems*,' and she has accepted, it is valid, but otherwise not; for this is an addition to dower which requires acceptance, and it serves as if he had renewed the marriage.

or by deed

As *rujât* is established by speech, it may be so likewise by deed; as by matrimonial intercourse, or touching with desire; so also by kissing on the mouth with desire, by general agreement. There is a difference of opinion as to kissing on the cheek, the chin, the forehead, or the head; but the most probable and correct opinion is that any kind of kiss that would induce the prohibition of affinity would be sufficient for this purpose. Looking on the nakedness with desire is also a retention, but looking on any other part of the person is not so; and whatever would induce the prohibition of affinity would suffice also for *rujât*. Kissing or touching without desire would not suffice, by general agreement; but it makes no difference whether the kissing, looking, or touching be on her part or on his, provided that when on her part it is with his knowledge and without his prohibition. If it were purely on her part, and without his per-

[1] Both the expressions are inflections of *rujât*.

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mission (he being asleep, for instance), or if she should act against his will, or when he is out of his right mind, still it is reported, as from Aboo Huneefa and Moohummud that it would be a retention, provided the husband give credit to her assertion that the act was with desire; but if he should deny that it was so, the retention would not be established; so, also, if the husband should die, and his heirs give credit to her assertion; but no proof could be received as to the fact of desire. Yet if witnesses should attest the fact of actual intercourse, that would be lawful. Retirement with a *Mooâtuddah* or woman in her *iddut* does not amount to retention, for that is not peculiar to a right of enjoyment, and anything that may be done by the husband that is not peculiar to such a right is not retention.

It is valid under compulsion or in jest,

Retention by an insane person must be by act and not by speech. Retention, like marriage, is valid, though made under compulsion, or in jest, or sport, or by mistake; and if a husband should allow a retention as pronounced by a *fuzolee*, or unauthorized person, it would also be valid; but

but not on a condition.

retention cannot be suspended on a condition; as if a husband should say 'When the morrow comes,' or 'when thou hast entered the house,' or 'done so and so, I have retained thee,' this would be no *rujât*, according to all opinions. Nor if he were to stipulate for an option would retention be valid; and if he should say, after repudiation, 'I have retained thee to-morrow,' or 'the beginning of the month,' it would not be valid, by all opinions.

Disputes between the parties.

If a husband should claim to have enjoyed his wife, and retirement has actually taken place between them, he may retain her; but if no retirement has taken place, he has no such power.[1] When the parties are agreed as to the expiration of the *iddut*, but differ as to the fact of *rujât*, the word of the wife is preferred. All are agreed as to this; and, according to Aboo Huneefa, an oath is not required of her. If, however, the *iddut* be still unexpired,

[1] There can be no revocable repudiation of an unenjoyed wife (see *ante*, p. 227), and consequently no *rujât*—see *post*, p. 291.

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preference is given to the word of the husband. If he should adduce proof after the *iddut* that he had said, during her *iddut*, 'I have retained her,' or 'have had matrimonial converse with her,' it would be a *rujât*. And though the *iddut* have expired, yet if he should say, 'I retained her during her *iddut*,' and she should assent, it would be a *rujât*. When a man has said to his wife, 'I have retained thee,' and she has answered on the instant, in connection with his words, 'My *iddut* is past,' the retention is not valid, according to Aboo Huneefa, and though the disciples were of a different opinion, his is held to be correct. The difference, too, was restricted to cases where the time admits of the expiration of the *iddut*, for otherwise the retention would be valid, according to them all. And here they are all agreed that her oath may be required as to the expiration of the *iddut*. They were also all agreed that if she had remained silent for a time, and then said 'My *iddut* is past,' the retention would be valid; but if the woman should commence the discourse by saying, 'My *iddut* is past,' and the husband should say in answer immediately, in connection with her words, 'I have retained thee,' the *rujât* would not be valid.

The right to retain a wife expires on the full completion of her *iddut*.

The right to retain a repudiated wife is at an end as soon as she has come out of her third courses if she be free, or the second if she be a slave, that is, on the completion of the tenth day, though the discharge should not have ceased. Where it has ceased before the completion of ten days, the time for *rujât* is not cut off till she has performed the customary ablutions, or the time for prayers has past. If the woman be a *kitabeeah*, it has been said that the right to retain her is cut off on the mere ceasing of the discharge. And if a man should retain his wife after the ablutions which terminate the proper time for retention, and should return to former habits with her before the ten days have expired, the retention would be valid. So, also, when the *tuyummum*, or purification by sand, has been used instead of ablution. And if she has neither washed, nor the full time for prayer has passed over her, though she may have used the sand purification

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(being on a journey), then the time for *rujât* is not cut off merely by the purification. But it is cut off when she has used such purification and has also said her prayers, according to Aboo Huneefa and Aboo Yoosuf; when she has washed and forgotten a part of her person to which the water has not reached, if it be a whole limb or more, the time of retention is not cut off, but if less than a limb it is.

Rujât of an unenjoyed wife.

A man has retired with his wife and has then repudiated her, saying, 'I have had no intercourse with her,' whether she confirm or deny the statement he has no power to retain her. Yet if he should retain her, and she should bear a child, at any time less than two years, and though only one day before she has given intimation of the expiration of her *iddut*, the retention would be valid. And if a man should repudiate his wife when she is pregnant, or after she has been delivered of a child, while she is still under his protection, and should declare that he had no intercourse with her, he may retain her; because the child when it appears within a time that admits of its being his (as, for instance, by its being born at six months or upwards from the day of marriage), is ascribed to him, so that its descent is established as from him.

A repudiated wife may adorn herself.

A woman repudiated revocably may adorn and beautify herself; but her husband should not enter her apartments without previous notice, or letting the sound of his shoes be heard, unless he means to retain her; and he has no right to take her with him on a journey until he has called upon witnesses to attest that he has retained her. So, also, it is unlawful for him to send her out on what may be less than a journey. And as it is abominable to take her on a journey, so it is also to be in retirement with her.

A revocable repudiation does not forbid matrimonial intercourse.

A revocable repudiation does not render matrimonial intercourse unlawful; so that if it should take place the husband is not liable to the *ookr*. When a man has repudiated his slave wife revocably, and then married a free woman, he may still retain the slave.

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Section.

What legalizes a repudiated Wife, and matters connected therewith.

A free woman repudiated thrice, or a slave twice, cannot be remarried until married and enjoyed by another husband.

When a man has repudiated his wife irrevocably, without giving her three repudiations, he may marry her again during her *iddut*, or after its expiration; but when he has repudiated her three times, being a free woman, or twice being a slave, it is not lawful for him to marry her again till she has been married by a valid and operative contract[1] to another husband, who, after enjoying her, has repudiated, or died, leaving her his widow. And in this there is no difference whether the repudiated woman were an enjoyed wife or not so. Penetration after the second marriage is a positive condition, but not emission. When a man has had illicit intercourse with a woman, or converse with her under a semblance of right, that does not legalize her to her first husband, for want of a valid marriage. So, also, when a master, by virtue of his right of property, has had intercourse with his married slave, and she is in consequence rendered unlawful to her husband, and then after the expiration of her *iddut* has intercourse with her again, that does not legalize her to her husband. A *moorahik* youth, in the matter of legalizing, is like an adult, that is, when intercourse has taken place before puberty, but the repudiation not till after it; for repudiation by a youth under puberty is of no effect. By *moorahik* is to be understood a boy who, though under puberty, is capable of intercourse with a woman, and whose connection with her obliges her to wash; and Shums ool Islam has fixed the age at ten years.

It is sufficient though the husband be a youth under puberty if *moorahik*,

or insane, or a slave.

Though the second husband be insane, or a slave, if he have married with the permission of his master and has consummated, the woman is rendered lawful. But when a woman has married a slave without the permission of

[1] To the exclusion of imperfect and suspended contracts. *Doorr ool Mookhtar*, p. 251.

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his master, and the slave has consummated with her, after which the marriage is allowed by the master, and the slave then repudiates her without having intercourse subsequent to the allowance, she is not rendered lawful to her first husband; for which purpose enjoyment after the permission is necessary. Intercourse with a very old man who cannot penetrate without the assistance of the woman's hand is not sufficient to legalise her. When a Christian woman married to a *Mooslim* has been repudiated by him three times, and has then married a Christian who enjoys her, she is rendered lawful to her *Mooslim* husband who had repudiated her. When a man has repudiated his wife three times, and she intermarries with another husband who repudiates her three times without enjoying her, and she then marries a third who does enjoy her, she is rendered lawful to whichever of the two first may re-marry her. When a thrice repudiated woman has apostatized and joined herself to the *dar ool hurb* or a foreign country, and has been subsequently captured,—or when a man has repudiated his slave wife twice, and has then become her proprietor; in neither case is matrimonial intercourse lawful until the woman has been married to another husband.

When a man may re-marry a thrice repudiated wife on her own assertion that she has been married to another and enjoyed by him.

When a man has repudiated his wife three times and she has said, 'My *iddut* having passed I married again, was enjoyed by my husband, and he has repudiated me, and my *iddut* has passed,' her first husband may lawfully believe her if time admit of all this, and he thinks it highly probable that she is speaking the truth. When a woman says that her second husband has had intercourse with her and he denies it, she is lawful to the first; but if the case were reversed, the second husband declaring and she denying the intercourse, she would not be lawful to the first.

When the first contract was invalid the repudiated wife may

When a man has married a woman by an invalid contract, and has repudiated her three times, he may lawfully re-marry her though she should not have intermediately married with another. When two witnesses have attested to a woman that her husband repudiated her three

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be re-married at once.

times, at a time that he was absent from her, she may marry another; but not if he were present.

How a thrice repudiated woman may protect herself from the advances of her former husband.

Aboo 'l Casim, being asked by a woman whose husband had repudiated her three times, but whom nevertheless she could not prevent from coming to her, if she might kill him, replied, 'Yes, if you kill him at the time that he is approaching you, and you cannot otherwise prevent him;' and several other learned men have approved of this opinion; but Asbeejanee was opposed to it, and it is stated in the Mooltukut that the *futwa* is in accordance with this view. When two just persons have attested to a woman that her husband has repudiated her three times, but he denies it, and the witnesses die or go away before they can give their testimony before the judge, she cannot lawfully remain with her husband: and if she should complain to the judge that he approaches her, and the husband should swear to his denial, and the judge (the witnesses being dead) should decree for her return to her husband, still she ought not to remain with him, but rather to ransom herself with her own property, or to run away from him; and if she can do neither, she may kill him when she knows that he is coming to her; but she ought to do so with medicine, and has no right to kill herself. But when she runs away from him she cannot keep *iddut* and marry another husband. Sheikh Hulwaee, however, has said that, though that be the rule, she may, as between herself and God when she has run away, keep *iddut* and marry another.

Devices for securing repudiation by the husband who is the legalizing medium.

Of the devices applicable to cases of this description, this seems to be one of the best: that the repudiated woman should marry a young slave just capable of legalizing her, and then, after he has enjoyed her, get the ownership of him by some means, which would cancel the marriage. A man has said, 'If I marry a woman she is repudiated three times.' The device in such a case is for a *fuzoolee* or unauthorized person to contract a marriage between them, which the man may confirm by deed without being forsworn, while if he were to do so by word he would be forsworn, and this device may be relied on.

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When a woman is afraid that the legalizer will not repudiate her, she may say, 'I marry myself to thee, on condition that my business is to be in my own hand, to repudiate myself whenever I please,' and he accept, such a marriage is lawful, and the business is in her hands.

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CHAPTER VII.

OF EELA.

Definition. EELA is a husband's prohibition of himself from approaching his wife[1] for four months when he is a free man,[2] and two months when a slave, the prohibition being confirmed by a *yumeen*, or vow, either by God or without Him; as by repudiation, emancipation, fasting, pilgrimage, or the Effect. like. So that if the husband should approach his wife during the time, he would be forsworn, and liable to expiation, when the oath is by God, whether by Himself or by any of His attributes by which it is customary to swear, or for the consequence of the condition in other cases; and the *eela* would cease after the approach. On the other hand, if he should not approach her during the time, she would become irrevocably repudiated by one repudiation,[3] and the oath would be at an end, if it were for four months; but if it were for ever, as by the husband's saying, 'By God! I will not approach thee for ever,' or if he were to say, 'By God! I will not approach thee,' without adding 'for ever,' the oath would remain, except in so far that the repudiation would not be repeated without a second marriage. If, however, he were to marry her a second time, the *eela* would revive, and if he had connection with her,[4] but if not another repudiation would

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[1] Carnally is implied.

[2] Founded on the text of the Koorán, 'They who vow to abstain from their wives are allowed to wait for four months.' Sale, vol. i., p. 39.

[3] The last requiring the decree of a judge. See *ante*, p. 203, and *Hidayah*, vol. ii., p. 470.

[4] Neither the authority cited, nor the *Hidayah*, where it is given

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take effect after the expiration of four months from the marriage; and if he were to marry her a third time, the *eela* would again return, and on the expiration of other four months another repudiation would take effect if there were no intermediate intercourse. If subsequently to all this, he should marry her after another husband has had her, repudiation would not take effect on that *eela*, but the vow would remain; and if he should have intercourse with her he would be liable to expiation.

It cannot be for less than four months.

When a man has sworn to abstain for less than four months, he is not a *moolee*,[1] according to the saying of Aboo Abbas—'There is no *eela* in what is less than four months,' which Aboo Huneefa adopted on receiving his *futwa*, though he was at first of a different opinion.[2] According to another authority, if a man should swear not to approach his wife for two months he would not be a *moolee*,[3] and a *moolee* is defined to be one who cannot approach his wife without incurring some difficult or troublesome liability.[4]

Eela by a *zimmee*.

When a *zimmee* has made an *eela* by one of the names of God, or by any of His attributes, he is a *moolee*, according to Aboo Huneefa, but not so according to the other two; while if he should swear by repudiation or emancipation he would be so in all their opinions. But if the oath were by pilgrimage, or by fasting, or alms, he would not be a *moolee*, according to them all; nor if he were to say to his wife, 'If I approach thee thou art to me like the back of my mother.'[5] When the *eela* of a *zimmee* is established, it is subject to the same rules as the *eela* of a *mooslim* in all respects, except that when he has intercourse with his

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in the same words, mentions the consequence, but the husband would no doubt be forsworn, as supplied in Mr. Hamilton's translation, and probably under the like penalty as if the *eela* were limited.

[1] Active participle of *eela*.

[2] *Hidayah* and *Kifayah*, vol. ii., p. 271.

[3] *Doorr ool Mookhtar*, p. 254.

[4] *Ibid.*, p. 254.

[5] This would be *zihar*, to which a *zimmee* is incompetent. See *post*, p. 326.

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wife, and the vow to abstain was by God, he is not liable for expiation.

Words by which *eela* may be effected.

The words by which *eela* may be effected are either *sureeh* or *kinayát*. The *sureeh*, or express, are all such words as first present to the mind the idea of sexual intercourse, as, 'I will not approach thee,' 'I will not unite with thee,' 'I will not have connection with thee,' or 'I will not lie with thee,' or 'wash away defilement on account of thee;' for by lying with a woman coition is usually meant, and washing for defilement on account of her is required for no other cause but that; so, also, 'I will not deflower thee,' when addressed to a virgin; for that cannot be done without coition. The *kinayát*, or ambiguous expressions, are words that do not first present to the mind the idea of coition, and are susceptible of another meaning, so long as *eela* is not intended by them; such as 'I will not come to her,' 'I will not enter to her,' 'Her head shall not be joined to mine,' 'I will not abide with thee in my bed,' 'I will not approach her bed,' &c. But if he should say, 'If I sleep with thee, thou art repudiated three times,' having no particular intention, that would be *eela*; the expressions being commonly used for coition, though if he mean merely lying side by side, he would not be a *moolee*, because that may be without coition. It is stated in the Yoonabeea that *eela* is contracted by all expressions by which a vow may be contracted. As if he were to say, 'By God,' or 'By the majesty or greatness of God; and that it cannot be contracted by any words which are not sufficient to effect a vow; as if he were to say, 'By the knowledge of God, I will not approach thee,' or 'The wrath of God be upon me,' and the like.

Who are competent to contract it.

The persons competent to pronounce an *eela* are those who are competent to repudiate, according to Aboo Huneefa; while, according to his two disciples, they are those on whom expiation is incumbent. They were all of opinion that no person can be a *moolee* except by an oath against natural intercourse, and if he is forsworn by any other than an oath of that description he is not a *moolee*.

What may be the

If one should say, 'When I approach thee prayer is incumbent on me,' he would not be a *moolee*. Nor if he

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should say, 'If I approach thee, or solicit thee to my bed, thou art repudiated.'[1] But when he swears by saying, 'If I approach thee, pilgrimage is incumbent on me,' or 'alms,' or 'fasting,' or 'a vow,' or 'the expiation of a vow,' he is a *moolee*; while, if he were to say, 'To follow a *junazah*' (or corpse to burial)' is incumbent on me,' or 'to read the Kooran,' or 'to say my prayers,' he would not be a *moolee*. But it ought to be a valid *eela*, if he were to say, 'I am bound for a hundred *rookâs*,' that is, to say them with a hundred *rookâs* (genuflexions), or anything similar, that would usually be attended with some trouble.

penalty when the *eela* is not by God.

If a man should say, 'I will not approach you two,' he is *moolee* to both; and when four months have passed without his approaching them they are both irrevocably repudiated; and if he should approach only one of them the *eela* would be void with respect to her, but subsisting for the other, and he would not be liable for any expiation; but if he should approach them both, the *eela* would be broken as to both, and he would incur the expiation of his vow. If one of them should die before the expiration of the four months, the *eela* of both would be void, and no expiation incurred, though he should afterwards have intercourse with the other, according to general agreement. But if he should repudiate one of them, the *eela* of the other would not be invalidated.

When two women are made the subject of one *eela*.

When a man has said, 'I will not approach one of you two,' he becomes a *moolee* to one of them, so that if he have intercourse with either, expiation is due and the *eela* void; and if one of them should die, or be repudiated thrice, or became absolutely separated by apostasy, the *eela* would be rendered specific as to the other; while, if he refrain from approaching both till the expiration of the four months, one of them, without distinguishing which, is repudiated irrevocably, and he may apply the repudiation to either at his pleasure; but he cannot make the *eela* special to one of them before the expiration of the four

When it is applied to one of them indefinitely.

[1] This would be no penalty, as a single repudiation may be revoked, contrary to the case of three repudiations.

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months, insomuch that if he were to attempt to do so by indicating one of them in particular, and the four months were then to expire, the repudiation would not fall on the individual specified, but would still be general, and he would have to make his choice; and if it should not take effect on one of them (as by his failing to exercise his choice) till the expiration of another four months, one repudiation would take effect on the other, and each would be irrevocably repudiated by one repudiation.

When applied to a wife and a slave, or a stranger.

If a man should swear not to approach his wife and his female slave, or his wife and a stranger, he would not become a *moolee* until he had approached the stranger or the slave, whereupon he would become a *moolee*; for after that he could not have intercourse with his wife without expiation. A man has said to his wife and his slave, 'By God, I will not approach one of you two,' he is not a *moolee* unless he intend the wife; but if he approach either he is forsworn; and even though he should emancipate the slave and then marry her, he would not become a *moolee*.

Eela followed by repudiation,

A man having pronounced an *eela* on his wife, repudiates her once irrevocably,—if four months expire from the time of the *eela*, and she is still in her *iddut*, another repudiation takes effect by virtue of the *eela*; but if her *iddut* is passed

or apostasy.

there is no repudiation by the *eela*. And if a man, after pronouncing an *eela*, should join himself as an apostate to the *dar ool hurb*, or a foreign country, and the four months should then expire, his wife would not become irrevocably separated by the *eela*, by reason of the decadence of his right over her, and her having become already separated by the apostasy. There are, however, two reports as to an *eela* and a *zihar* being rendered void by apostasy, but this is approved. A slave having pronounced an *eela* on his free wife, afterwards becomes her property, the *eela* does not remain; but if she were to sell or emancipate and then re-marry him, the *eela* would revive.

When the *eela* is for two months

When a man has said, 'By God, I will not approach thee for two months and two months,' or 'I will not approach thee for two months and two months after these

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two months,' he is a *moolee*. But if he should say, 'By God, I will not approach thee for two months,' and then should stop for a day and say, 'By God, I will not approach thee for two months after the first two months,' he would not be a *moolee*. So also if he should say, 'By God, I will not approach thee for two months,' then stop for an hour (*saât*) and say, 'By God, I will not approach thee for two months,' he would not be a *moolee*. and two months.

When a man has sworn not to approach his wife by the emancipation of a slave,[1] and has then sold him, the *eela* fails, but revives if he again become possessed of the slave before approaching his wife; not so, however, if this do not take place till after he has had intercourse with her. And suppose a man to say, 'If I approach my wife these my two slaves are free,' and that one of them dies or is sold, that would not cancel the *eela*; whereas, if they were both to die or be sold, whether together or one after the other, the *eela* would be cancelled; while if he should again by any means become repossessed of one of them, before approaching his wife, the *eela* would revive as to that one; and so also if he became possessed of the other the *eela* would also revive as to him, from the time of the reacquisition of the first. A man says to his wife, 'If I approach thee this my slave is free,' and four months having passed the matter is litigated before the judge, who decrees a separation between the parties; the slave then adduces proof of his being free by origin; whereupon the judge must decree his freedom and cancel the *eela*, restoring the woman to her husband, because, in fact, proof has been adduced that the husband never was a *moolee*, and might therefore approach his wife without incurring any liability. When it is by the emancipation of a slave who is subsequently sold, or proves to have been free.

If *eela* be pronounced three times at one meeting, only one takes place, according to the two disciples, on a favourable construction; but if they were at different meetings it would be a repetition. When a man has said When more than one *eela* is pronounced on the same woman.

[1] As by saying, 'If I approach thee, then my slave is free.' *Inayah*, vol. ii., p. 211.

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'By God, I will not approach thee,' and a day having passed he then says, 'By God, I will not approach thee,' and another day having passed again he says, 'By God, I will not approach thee,'—there are three *eelas* and three vows; and if he should not approach her till the expiration of four months, she would become irrevocably repudiated once, and after the expiration of a day a second irrevocable repudiation would take place, and again after another day a third, making three repudiations; after which she would not be lawful to him till another husband has married her, and even then, if he were to approach her after that, he would be liable for three expiations. A man has said, 'I will not approach for a year bating a day,' the day is to be reckoned at the end of the year, by general agreement. A man says to his wife, 'By God, I will not approach thee for a year:' when four months have passed she is irrevocably repudiated, and he then marries her again and four months having passed, she is again irrevocably repudiated; but if he should marry her three times, a third repudiation would not take place, because less than four months would remain of the year after the third marriage. If he were to say, 'I will not approach thee for a year except a day,' he would not be a *moolee* on the instant, according to 'our' three masters. But if after this he should have intercourse with her, and there should be four months of the year still to run, he would then become a *moolee*. So also, if instead of 'except a day,' he should say 'except once;' but in the latter case the time would be reckoned from the actual intercourse, while in the former it would be from sunset on the day when it took place. A man who is at Busrah, with his wife, does not become a *moolee* by saying, 'I will not enter Koofah.' But when a man has said, 'I will not approach thee while this river continues to flow,' and it is one where waters are never cut off, he is a *moolee*; otherwise not.

If the *eela* were made in health it can be

When the *moolee* was, at the time of contracting the *eela*, in good health and able for matrimonial intercourse, the *fuy*, or return to his wife, is by such intercourse, and

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not by speech; and though he were to kiss or touch her, or look on her nakedness with desire, there would be no return. Even though he should subsequently fall ill, still the return must be by intercourse, according to 'us,' in opposition to the opinion of Zoofr, who thought that allowance should be made for inability at the end of the period.[1] rescinded only by intercourse.

But if the *moolee* were sick and unable for matrimonial intercourse, or if his wife were sick at the time of the *eela*, the return may be by speech, as by his saying, 'I have returned to her;' and when he has said so it is like a *fuy*, or return by intercourse, in nullifying the effect of the oath so long as the sickness lasts. But if he should become competent for matrimonial intercourse before the expiration of the four months, this *fuy* or return by speech would be cancelled, and another must be made by intercourse.[2] When a *fuy*, or return, has been effected by speech, as by his saying, 'I have returned to her,' repudiation does not take effect on her by the passing of the time; but the *yumeen*, if it were in absolute terms, remains as it was, so that if he have intercourse with her he is liable to expiation. If, however, it were limited to four months, and he should have intercourse with her after their expiration, no expiation would be incurred.[3] If a man were prevented from matrimonial intercourse by physical obstruction in the woman, or by her extreme youth, or by *jub*, or impotency; or if he were a prisoner in the enemy's country, or she were withholding herself from him, or in a place unknown to him, the return may be by speech, as by his saying, 'I have returned to her,' or 'retained her,' or 'cancelled the *eela*;' provided that the inability is continued till the completion of the period. But if the preventive were only legal, as by his being in the pilgrim's garment on *hujj* or pilgrimage for four months, the return can only be by actual intercourse. But may by speech, if made in sickness, or under any other physical disability.

When a dispute has arisen between the parties within Of disputes between the parties.

[1] *Inayah*, vol. ii., p. 218.

[2] *Hidayah*, vol. ii., p. 276.

[3] Otherwise if before the expiration, because in that event the previous return by speech would have been void.

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the period the word is with the husband. Still, if the wife knows that he is speaking falsely, she ought not to remain with him, but rather to fly from him, or ransom herself with property to escape sin. And if the dispute should not arise till after the expiration of the period, and the husband claims that he returned to her within the four months, he is not to be credited unless the assertion is assented to by her.

Eela made dependent on the will of the woman, or another.

When a husband has said to his wife, 'If thou willest, by God, I will not approach thee,' and she has declared that she wills at the meeting, he becomes a *moolee*. So also when the reference is to the will of such a person, and he declares his will at the meeting. When a man has said to his wife, 'Thou art unlawful to me,' and this has occurred at a time when there has been no talk between them of repudiation, he should be asked as to his intention;[1] and if he intended repudiation thereby she is irrevocably repudiated; if he intended three repudiations, three take effect; if two it is not valid, except in the case of a female slave; if he intended *zihar*, it is *zihar*, according to Aboo Huneefa and Aboo Yoosuf; and if he intended a *yumeen* or had no particular intention, it is *eela*; and if he meant a lie, it is to be taken as such. If he were to say, 'You two are to me unlawful,' he would be a *moolee* as to each of them, and would be forsworn by having intercourse with either.

[1] *Hidayah*, vol. ii., p. 276.

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CHAPTER VIII.

OF 'KHOOLÂ' AND WHAT COMES UNDER ITS EFFECT.

SECTION FIRST.

Definition, conditions, and legal effect of 'Khoolâ.'

KHOOLÂ means to put off, as a man is said to *khoolâ* his garment when he puts it off.[1] It also means to demit or depress generally.[2] In law, it is the demission or laying down by a husband of his right and authority over his wife, for an exchange, to take effect on her acceptance,[3] by means of the word *khoolâ*; and it is also validly effected by words of sale and purchase, and also by words in the Persian language. Its condition is that of *tulák*, or repudiation, and its effect one irrevocable repudiation.[4] It is, however, valid as to three repudiations when so intended. And if a man should marry a woman three times, and give her a *khoolâ* in each contract, it would not be lawful for him, according to 'us,' to marry her after the third until she had intermarried with another husband. The presence of the Sultan is not required as a condition of the legality of *khoolâ*, according to general agreement, and this is correct.

Definition.

Condition.

Effect.

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[1] *Kifayah*, vol. ii., p. 278.

[2] *Doorr ool Mookhtar*, p. 256.

[3] This clause of the definition is added from the *Doorr ool Mookhtar*, and is implied in what follows.

[4] Two reasons are assigned for this: a saying of the Prophet, and because *khoolâ* is one of the *kinayát*, or ambiguous expressions by which a wife may be repudiated. *Inayah*, vol. ii. p. 221, and see *ante*, p. 230.

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Moobarát, and other expressions equivalent to *khoolâ*, but acceptance by the wife required in all cases.

Whether the word *khoolâ*, or *moobarát* (which means a mutual release),[1] or sale, be employed, as, for instance, whether a person should say, 'I have given thee a *khoolâ* for a thousand *dirhems*,' or 'repudiated thee for a thousand,' or 'released thee,' or 'sold thyself to thee,' or 'thy repudiation to thee for a thousand,' repudiation does not take effect without her acceptance at the meeting, for the transaction is an exchange.[2]

When, and on what terms it is justifiable.

When married parties disagree, and are apprehensive that they cannot observe the bounds prescribed by Almighty God (or, in other words, perform the duties incumbent on them by the marriage relation),[3] there is no objection to the woman's ransoming herself from her husband, with property, in consideration of which he is to give her a *khoolâ*; and when they have done this, one irrevocable repudiation takes place, and she is liable for the property. When the aversion is on the part of the husband, it is not lawful for him to take anything from her in exchange for the *khoolâ*. But this is only as a matter of conscience; and if he should take it, the legal effect is valid, notwithstanding, and she has no right to demand restitution of what she has given. And when the aversion is on her part, 'we' abominate his taking from her more than he gave her as dower; but, notwithstanding, it is lawful for him judicially to take more.

Further effect of *khoolâ* in a mutual release of liabilities.

Khoolâ and *moobarát* (mutual release) cause every right to fall or cease which either party has against the other depending on marriage. With regard to a repudiation for property there are two reports; but, according to that which is correct and relied on, it does not operate as a release.[4] When a *khoolâ* is made by means of the word *khoolâ*, it does not occasion a release of any other debts than dower, according to Aboo Huneefa, as reported in the Zahir Rewayut, which is held to be correct. In like

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[1] *Doorr ool Mookhtar*, p. 258. [2] *Kifayah*, vol. ii., p. 278.

[3] *Inayah*, vol. ii., p. 221.

[4] The *Khoolasa* is cited as the authority, and it is confirmed by the *Doorr ool Mookhtar*, p. 258.

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manner, with regard to the word *moobarât*, though there is a difference of opinion, the correct view is that it does not occasion a release of other debts than dower.[1] So, also, with regard to the words, sale and purchase: though there is the like difference of opinion, the most correct is, that, like *khoolâ* and *moobarât*, they do not occasion a release of other debts than dower. Neither these words nor repudiation for property occasion a release of maintenance during *iddut*,[2] without a condition to that effect, according to all opinions. Nor do they effect a release from the maintenance of a child, or the hire of suckling it, without a special condition. If there is a condition to that effect, and a fixed time is specified, the release is lawful, but otherwise not; and when it is rendered lawful by specification of time and condition, and the child happens to die before completion of the time, the husband may reclaim a due proportion of the hire.

Application of the rule when the exchange is property equal to the dower, and the word *khoolâ* is employed.

When a *khoolâ* has been entered into[3] for property named, known, and equal to the dower, then if the woman has been enjoyed and has taken possession of the dower, she must deliver the exchange for the *khoolâ*, to her husband, and neither party can follow the other for anything after the repudiation; and though she may not have taken possession of the dower, she must still deliver the exchange for the *khoolâ*, and according to Aboo Huneefa, has no claim for any portion of the dower. If, again, she has

[1] It appears from the *Hidayah* (vol. ii., p. 290) that the difference was between Aboo Huneefa and his disciples, and that Moohummud, in direct opposition to him, held that nothing falls on either side except what is specially mentioned by the parties; while Aboo Yoosuf agreed with him as to *khoolâ*, but with Aboo Huneefa as to *moobarât*. The author, as usual, gives the reasons on both sides, without deciding for either. The compilers of the *Futawa Alumgeeree* have adopted the opinion of Aboo Huneefa, without mentioning that of Moohummud, and noticing Aboo Yoosuf's only where it agrees with the master's. The authority cited is the *Kanz ood Dukaik*, and it is confirmed by the *Doorr ool Mookhtar*, p. 258.

[2] Maintenance during the *iddut* is to be distinguished from any past maintenance that may be due to her. *Inayah*, vol. ii., p. 230.

[3] The word in the original is *mookhalaut*, which signifies mutual action.

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not been enjoyed, yet has obtained possession of the dower, the husband can take from her the exchange for the *khoolâ*; but, according to the same authority, he has no claim against her for half the dower, on the ground of the repudiation being before consummation; and if she has not obtained possession of the dower, the husband can still, according to his opinion, take from her the exchange for the *khoolâ*, while she has no claim against him for half the dower.

When the word *moobarât* is employed.

When a husband has released [1] his wife for known property equal to the dower, the answer (or result) is the same according to Aboo Huneefa and Aboo Yoosuf as it is in the case of *khoolâ* according to Aboo Huneefa alone.

When the exchange is for the dower itself.

When a *khoolâ* has been entered into for the dower, then, if the woman has been enjoyed and has obtained possession of it, the husband may reclaim it from her; and if she has not obtained possession of it his liability for the whole dower falls to the ground, and neither party has any claim against the other for anything. If, again, she has not been enjoyed, yet has obtained possession of the dower, supposing it to be a thousand *dirhems*, the husband may revert to her for the whole thousand, on a favourable construction; and if she has not obtained possession of the dower, her right to the whole falls to the ground on a favourable construction, and he has no further claim against her.

When the exchange is a part of the dower.

When a *khoolâ* has been entered into for a tenth of the dower (still supposing it to be a thousand *dirhems*), then, if the woman has been enjoyed and has got possession of the dower, the husband may sue her for a hundred *dirhems*, but must relinquish the remainder, according to all their opinions; and if she has not obtained possession of it, her right to the whole falls to the ground according to Aboo Huneefa: while, if she has not been enjoyed, yet has obtained possession of the dower, the husband may have recourse to her for a tenth of half the dower, that is, for fifty *dirhems*, but leave her in possession of the remainder; and if she has not obtained possession of the dower,

[1] The word in the original is an inflection of *moobarât*.

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he is released from the whole, according to Aboo Huneefa.

What has been said applies to cases where a *khoolâ* has been entered into for the whole, or a part, of the dower; but when they have entered into a *moobarát* for the whole, or a part, of the dower, then the answer would be the same according to both Aboo Huneefa and Aboo Yoosuf, as according to the former alone in the case of *khoolâ*. When it is for the dower or a part of it, and the word *moobarát* is employed.

When a man makes a *khoolâ* for what is due to his wife of her dower, and it appears that nothing is due to her by him, she must restore the dower to him. As if for instance he had said, 'I give thee a *khoolâ* for this slave of thine,' or 'this piece of furniture of thine, that is in my hands,' and it should appear that there was nothing of hers in his hands—the *khoolâ* would be for the dower, which would fall if still due by the husband, and must be restored if taken possession of by her. But if he should enter into a *khoolâ* with her, or give her one *tulák*, for the dower that is due to her, well knowing that no dower is due to her by him, and she should accept, one irrevocable repudiation would take effect, gratuitously in the case of the *khoolâ*, and in that of the *tulák*, for her dower, there would be one revocable repudiation. When it is for what may be due, and nothing is due.

When a *khoolâ* has been entered into, any addition made to the exchange is void. If a woman should enter into a *khoolâ* on the terms of keeping a child till puberty, the *khoolâ* is valid if the child be a female, but not so if the child be a son; for a son ought to be trained to the manners and behaviour of men, and is more likely, if left with his mother beyond the proper age, to be trained to those of women, which would be injurious to him. If the mother should marry, the father may take back the child from her, and though they should come to an agreement on the subject, he cannot leave the child with her, for this is a right of the child. And when it is said that a *khoolâ* would be lawful on the terms of keeping a child, it is to be understood that the time for which the child is to be kept is specified, for otherwise it would not be valid. A man When for the keep of a child.

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enters into a *khoolâ* with his wife, and there being an infant child of the marriage, it is agreed that the child shall remain with the father for a known number of years—the *khoolâ* is valid, but the condition void, for the child being an infant has a right to be with its mother, and the right cannot be cancelled by its parents. A woman takes a *khoolâ* from her husband on the condition that she is to give her dower to her child, or to such an one who is a stranger: the *khoolâ*, according to Moohummud, is lawful, but the dower belongs to her husband, and there is nothing for the child or the stranger.

Miscellaneous cases where the word *khoolâ* is used.

If a man should say, 'Give thyself a *khoolâ*,' and she should say, 'I have given myself a *khoolâ*[1] from thee,' and the husband should allow it, it would be lawful without any property; but the second Imam has said that when the man says to her, 'Give thyself a *khoolâ*,' and she says, 'I have given myself a *khoolâ*,' it is not without property unless he intended it to be so;[2] and if he were to say to a third party, 'Give my wife a *khoolâ*,' he would not have the power to do so without property. If the husband should say to the wife, 'Give thyself a *khoolâ*,' and she were to say, 'I have repudiated myself,' she would be liable for some property unless he intended that it should be without property.

When it is used on one side and *tulâk* on the other.

A woman says to her husband, 'Give me a *khoolâ* for a thousand *dirhems*,' and he says, 'Thou art repudiated:' opinions differ, some saying that the words of the husband are an answer to the request, and that the *khoolâ* is completed, while others maintain that repudiation takes effect, and that there is no *khoolâ*. The approved view, however, is to construe his words as an answer; yet if he should afterwards say, 'I did not intend them as an answer,' his word would be preferred, and repudiation would take effect without anything, that is, gratuitously. And in like

[1] The expressions in the original are, as if it could be said in English, '*Khoolâ* thyself,' and 'I have *khoolâ'd* myself.'

[2] The question seems to be, whether it is a *khoolâ*, or only a repudiation by virtue of the word as one of the *kinayât*, or ambiguous expressions, which require intention. See *ante*, p. 229.

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manner, if a woman should say to her husband, 'I have taken a *khoolâ* from thee,' and he should say to her, 'I have repudiated thee,' some say that this would be an answer, and the *khoolâ* completed between them; while others insist that one revocable repudiation would take effect; and others, again, say that the husband should be asked as to his intention, and his words if intended to be an answer should be taken as such; and that a similar course should be followed in the first case, and the husband questioned as to his intention. A woman says to her husband, 'Give me a *khoolâ* for so much,' and he says, 'I have certainly repudiated thee:' this is a commencement without any difference of opinion.[1] But when she has said, 'Give me a *khoolâ*,' or (in Persian) 'I have bought myself,' and he in answer to her says, 'Thou art repudiated,' the words are to be taken as coming instead of 'I have given thee a *khoolâ*;' and the *futwa* is in conformity with this, that is if he intend it to be an answer.

When the words purchase and sale are employed.

When a man has said to his wife, 'Thou hast bought from me three repudiations for thy dower and maintenance during *iddut*,' and she has answered, 'I have bought,' there is no repudiation till he say, 'I have sold,' unless he intended to confirm the fact, and not to make an offer. But if he should say, 'Buy of me three repudiations for thy dower and the maintenance of thy *iddut*,' and she should say, 'I have bought,' there would be a complete *khoolâ* between them. And if *he* were to say, 'I have sold thyself to thee,' and *she*, 'I have bought,' there would be an irrevocable repudiation. A man has said to his wife, 'I have sold to thee thy business for a thousand *dirhems*,' and she has said at the meeting, 'I have chosen myself;' repudiation takes effect at the thousand. By-standers[2] say to a woman, 'Hast thou bought thyself with one repudiation for all the rights that women have against men, of dower and maintenance during *iddut*?'

[1] That is, it is not to be taken as an answer to the previous request for *khoolâ*.

[2] Rather by-*sitters*.

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and she answers, 'I have bought;' whereupon they say to the man, 'Hast thou sold?' and he says, 'Yes:' the *khoolâ* is valid, and the husband freed: though it has not been said to the woman, 'Hast thou bought thyself *from him?*' for the purchase of herself could only be from her husband.

Section Second.

Of what may lawfully be the Exchange in Khoolâ.

What is lawful.

What is lawful to be dower is lawful to be the exchange in *khoolâ*.

When the exchange is not lawful, there is no liability on the wife.

When a *khoolâ* has been entered into for wine, pork, carrion, or blood, and the husband has accepted the terms, a separation is established between the parties, but none of the things specified is obligatory on the wife; nor has she to restore any part of the dower.[1] When the *khoolâ* is for a slave of the husband's, or a husband repudiates his wife for a slave of his own, nothing is due by her, but it is necessary that she should accept in order to give effect to the repudiation; and in every case where there is no liability for property (*mal*), and the transaction is effected by the word *khoolâ*, or 'sale,' the repudiation is irrevocable; but where it is effected by the word *tulâk*, or repudiation, it is revocable, if after consummation; in the same way as if a person should repudiate his wife for wine, or for a release from any other debt than dower which he may owe her, or for the postponement of such a debt, when the release would be valid, and the postponement so also, if for a definite time; but the repudiation would be revocable.[2]

Effect of there being no liability.

Difference between a

A man says to his wife, 'I have given thee a *khoolâ*,'[3]

[1] None of the things specified could be the subject of dower, and there is no *khoolâ;* but still a separation is established by virtue of the term as one of the *kinayát* or ambiguous expressions by which repudiation is effected. *Inayah*, vol. i., p. 223.

[2] In none of the cases mentioned is the exchange *mal*, otherwise the repudiation would be irrevocable. See *post*, p. 314.

[3] The verb being of the first conjugation, and signifying action

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and she answers, 'I have accepted;' no part of the dower drops, but an irrevocable repudiation is effected by what he has said if he intended it, instead of any reference to her acceptance. So that if he intended repudiation, an irrevocable repudiation would take place, though she had not accepted; while if he should say that he did not intend repudiation, none would be effected, his assertion being good in conscience and judicially. When again they have mutually entered into a *khoolâ*[1] without mentioning an exchange, it is correct to say that each of the parties would be freed from his fellow, and that if no part of the dower were due by the husband she would be obliged to restore what may have been advanced to her of the dower, the mention of property being usually involved in that of *khoolâ*.

khoolâ expressed simply and in a reciprocal form.

When a *khoolâ* is made for something to be fixed by him or her, or by a stranger, it is lawful, as in the case of dower, with this difference, that there the standard is the proper dower, while here it is the dower he may have given her. If, then, it were to be fixed by the husband, and he should specify that amount or less, it would be valid; but if he were to specify more it would not be so unless assented to by the wife; and, in like manner, if it were to be fixed by her, and she should specify that amount or more, it would be lawful; but if less, the abatement would not be established unless he were content. In like manner, when the amount is to be fixed by a stranger, and he specifies more or less than the amount of the dower, the excess is not lawful against the husband, nor the abatement lawful against the wife, unless assented to by him or her respectively, as the case may be.

Khoolâ for exchange to be fixed by one of the parties or a stranger.

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only on one side, mere acceptance without an exchange is not sufficient to make a *khoolâ*.

[1] The verb is here an increased conjugation, and of a form that signifies reciprocal action, implying that what is done by the one is done by the other. The *khoolâ* is therefore referred to as complete. The formula, as rendered in the *Doorr ool Mookhtar* (p. 259), is as follows: 'The husband says to the wife, "I have given thee a *mookalaut*," or mutual *khoolâ*, and she accepts, she is repudiated,' &c.

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Section Third.

Of Repudiation for Property.[1]

A repudiation for property is irrevocable.

When a husband has repudiated his wife for property, and she has accepted, an irrevocable repudiation takes effect and she is liable for the property. When he has repudiated her before consummation for a thousand, and three thousand are due by him to her for dower, one thousand and five hundred drop by reason of the repudiation being before consummation; and the remainder being a debt against him, one thousand of it is set off against her liability, and she is entitled to revert to him for five hundred. When he has made the dower into three parts, and repudiated her once for a third of the dower, and then a second and a third time in like manner, three repudiations take effect, but only one-third of the dower drops, the husband being liable for the remainder.

The exchange is divisible when three repudiations are asked for, and only one given.

If a woman should say, 'Repudiate me three times *for* a thousand,' and he should give her one repudiation, she would be liable for a third of the thousand;[2] but if she were to say, 'Repudiate me three times *on* a thousand,' and he should repudiate her once, she would not be liable for anything, according to Aboo Huneefa,[3] but the husband would have power to revoke. If, on the other hand, the husband should say, 'Repudiate thyself thrice for a thousand,' or 'on a thousand,' and she should give herself one

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[1] Arab, *mal*, defined to be 'that which can be taken possession of, and secured' (*Kifayah*, vol. iii., p. 103), and therefore something tangible or corporeal.

[2] Because in contracts of exchange not only the whole but the parts of the things exchanged are held to be opposed to each other; the case is therefore the same as if she asked each of the three repudiations for a third of the thousand (*Hidayah*, vol. ii., p. 284).

[3] While the disciples thought that the words *for* and *on* were substantially the same in contracts of exchange, Aboo Huneefa was of opinion that *on* (*ula*) is properly a conditional particle, and that the case is the same as if she had said, 'If you repudiate me three times you shall have the thousand' (*Kifayah*, vol. ii., p. 285).

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repudiation, nothing would take effect. A woman says to her husband, 'Repudiate me three times for a thousand,' and he having already in fact repudiated her twice gives her one repudiation, she is liable for the thousand. And if he should say to her, 'Thou art repudiated *on* a thousand,' and she should accept, she would be repudiated and liable for the thousand; this being like his saying, 'Thou art repudiated for a thousand;' and acceptance is required in both cases. A man has said to a strange woman, 'Thou art repudiated on a thousand if I marry thee,' and she accepts, after which he marries her, but no regard is paid to the acceptance unless it take place after marriage.

Also when repudiation is asked for by two women in exchange for one sum.

When a man has two wives and they both ask him to repudiate them both *on* a thousand *dirhems*, or *for* a thousand *dirhems*, and he repudiates one of them, she becomes liable for her share of the thousand, and if he should repudiate the other she would also be liable for her share, if the repudiation took place at the meeting. But if they separate before he has repudiated one of them, the declaration of both is cancelled by the separation, and if he should repudiate them after that, the repudiation would be without any exchange. A man having two wives says, 'One of you two is repudiated for a thousand *dirhems*, and the other for five hundred,' and both accept, they are both repudiated, and each liable for five hundred, what is beyond that being in doubt between them; but if he should say, 'and the other for a hundred *deenars*,' neither would be liable for anything, because there would be doubts as to each.

When the exchange is not property, the repudiation is revocable.

When a man repudiates his wife on condition that she shall release him from his bail for the person of such an one, the repudiation is revocable; but if it were on condition of her releasing him from the thousand for which he is bail to her for such an one, the repudiation would be irrevocable.[1] 'Repudiate me' (she says) 'on condition of my postponing the payment of what you owe me,' and

[1] In the first case the consideration would not be property.

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he does repudiate her: if there be a fixed term for the postponement it is valid, but otherwise not, and the repudiation is revocable in both cases.

Delivery of the exchange in *khoolâ* may be postponed.

A postponement of the exchange for a *khoolâ* is valid, though the term should be unknown, if it be capable of being fixed, as for instance, the time of reaping, or treading out the grain; but if the uncertainty be very great, as the blowing of the wind, for instance, the postponement is not valid and the property is due immediately. A *khoolâ* may be lawfully made on the crop of the woman's land, or the riding of her cattle, or her own service in any way that would not require her being in retirement with him, or on the service of a stranger.[1]

How *khoolâ* is regarded on the part of the husband;

Khoolâ is regarded on the part of a husband as a suspension of repudiation on acceptance by the wife; so that his retractation of it is not valid, nor is it cancelled by his rising from the meeting; while it is valid though she were absent, insomuch that when she receives the intelligence of it she has an option at the meeting. The suspension of it on a condition and with reference to a future time is also valid; as when a person says, 'When to-morrow comes,' or 'when such an one arrives, I have *khoolâ'd* you for a thousand,' she has to accept after the coming of the morrow, or the arrival of the person. On the part of the wife it is to be regarded as a transfer for an exchange as in sale, so that she may retract before acceptance; and it is cancelled by her rising from the meeting, and neither its suspension on a condition nor a referring of it to a future time is lawful. There may, however, be a condition of option to her though not to him. A man has said to his wife, 'Thou art repudiated on a thousand on condition that I am to have an option for three days,' and she accepts, the option is void, and the repudiation takes effect; but if he were to say, 'Thou art repudiated on a thousand on condition that thou art to have an option for three days,' and she should say, 'I

and on that of the wife.

[1] These being profits are sufficient as the subject of dower. See *ante*, p. 93.

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have accepted,' and were to refuse the repudiation within three days, it would be void; while if she were to adopt it within the time it would take effect, and she become liable for the thousand to her husband. If they should enter into a *khoolâ*, both being walking at the time, and the words of each are consecutive, the *khoolâ* is valid, but if they are not consecutive it is not; neither does repudiation take effect.

A repudiation for property like a *khoolâ* in its effects.

A repudiation on property comes into the stead of a *khoolâ* as to its effects; except that in the latter when the consideration is void there remains an irrevocable repudiation, while in the former when the consideration is void the repudiation is revocable, and when the consideration is incumbent on the wife the repudiation is irrevocable.[1]

Disputes between the married parties, and how the burden of proof is regulated.

A woman says to her husband, 'I asked thee thrice for a thousand, and thou gavest me one,' and the husband says, 'Thou askedst of me one:' the word is with her (that is, hers is to be preferred), and the burden of proof upon him. And when a man says to his wife, 'I repudiated thee yesterday for a thousand *dirhems*, but thou didst not accept,' the word is his with his oath. If he should say, 'I sold thee yesterday thy repudiation for a thousand, and thou didst not accept,' and she should say, 'I did accept,' the word is with her (or hers is preferred), because an acknowledgment of sale is an acknowledgment of acceptance, that being a condition of sale. The difference between the two last cases is, that a repudiation for property is a *yumeen* or oath on the part of the husband, and acceptance only the condition on which it is made to depend. Acknowledgment of the former, therefore, is not an acknowledgment of the latter, and when married parties differ as to the occurrence of a condition, the word of the husband is preferred because he is the denier. But in the case of sale, as the contract cannot be effected without

[1] There is another important exception, that the repudiation for property is not what is termed *mooskit lil hookook*, or a *feller* of rights depending on marriage. See *ante*, p. 306.

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acceptance, acknowledgment of sale is necessarily an acknowledgment of acceptance, and when the husband, after acknowledging the former, denies the latter, his denial is a contradiction in terms, and not entitled to any credit.[1] In like manner if one should say to his slave, 'I sold yourself to you for a thousand, but you did not accept,' and the slave should say, 'I did accept,' the word of the slave would be preferred; while if the master should say, 'I emancipated you yesterday for a thousand, but you did not accept,' and the slave should say, 'I did accept,' the word of the emancipator would be preferred; emancipation and repudiation being in this respect alike.[2] If a woman should say, 'I asked thee to repudiate me for a hundred *dirhems*,' and the husband should answer, 'Nay, but for a thousand,' the word is with her; and if both should adduce proof, the proof of the husband would be preferred. And in like manner, if she should say, 'Thou gavest me a *khoolâ* for nothing,' and the husband should say, 'Nay, but it was for a thousand,' the word would be with her; but if both should adduce proof his would be preferred.[3] And if he should sue for a *khoolâ* on property (that is, for property on the ground of a *khoolâ*) and she should deny it, repudiation takes effect by reason of his acknowledgment,[4] and the claim for property remains as it was, the word being with her, as she is the denier. But not so in the opposite case (that is if she should sue for a *khoolâ* on the ground of having paid for it); and if he should deny the *khoolâ*, or claim that there was a condition or exception (*istisna*), or say that 'What I took possession of was a debt due to me,' or they should differ as to the *khoolâ* having been on compulsion or willingly, the word

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[1] *Hidayah* and *Kifayah*, vol. ii., pp. 289 and 290.

[2] *Kifayah*, vol. ii., p. 290.

[3] From here to the end of the paragraph is from the *Doorr ool Mookhtar*, p. 258.

[4] Involved in the claim of *khoolâ*, which is a release from the marriage tie, but differs from *tulak* in so far that it cancels, according to the same author, any existing claim on the part of the wife to dower. See *ante*, p. 307, note.

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of the husband would be preferred. And if she should say (that is in answer to his suit) that the *khoolâ* was without any exchange, her word would be preferred.[1] A woman has sued for dower and maintenance during her *iddut*, and that her husband repudiated her, and he has pleaded a *khoolâ*, and there is no proof, the word is hers as to the dower, and his as to the maintenance.[2]

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[1] There is some obscurity in the whole of the passage which I have endeavoured to clear away by the words within parentheses.

[2] It is hers as to the dower, because, a wife is *primâ facie* entitled to payment of her dower by the mere contract of marriage; and it is his as to the maintenance, because she has no right to maintenance during her *iddut*, except in a case of repudiation. His claim of *khoolâ* here is, therefore, not an acknowledgment of repudiation, or else the word would be hers with respect to the maintenance as well as to the dower. And accordingly, the author does not say, as he had said in the case on the preceding page, that repudiation takes effect. In the case of Moonshee Buzl ool Ruheem, appellant, and Mt. Luteefut oon Nessa, respondent (Sevestre's *Reports of Indian Cases affirmed on Appeal by the Privy Council*, vol. vii., p. 251), the following question was put to the Cazee, or Moohummudan law officer of the court of S. D. A., Calcutta:—'Does the mere fact of the husband pleading a *khoolâ nama* have the effect of proving a divorce, such as to entitle the wife to claim the immediate payment of the dower, just as if the alleged divorce had been proved?' And the Cazee is reported to have answered—'Under the circumstances mentioned in the question put by the court, the fact of the husband pleading or asserting a *khoolâ* (which means a divorce in lieu of property) will have the effect of a divorce, and will entitle the wife to obtain immediate payment of her dower, just as if the divorce had been proved.' The Cazee quotes the passage now under consideration, but omits the words, 'and his as to the maintenance,' which appear to me to contain the true clue to its meaning. Moreover, it appears that in the other authorities which he has quoted (the originals of which are given in Mr. Sevestre's excellent report, and which are all cases of claims, and not of pleas), the Cazee has added to the word 'claims,' wherever it occurs, the explanation, 'or pleads,' and that in one of them he has added the following words, which appear in the report within parentheses, and on which the reporter remarks in a note (p. 257) that they are the Cazee's own explanation of the law: 'it matters not whether the husband originally be a plaintiff or defendant.' I have no doubt that the Cazee delivered his opinion conscientiously, but he seems to have forgotten that *khoolâ* is not like an ordinary divorce that entitles a wife to immediate payment of her dower, but a divorce that occasions

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When a wife has made a *khoolâ* with her husband on property, and has subsequently adduced proof against him that he had repudiated her three times, or irrevocably, before the *khoolâ*, the proof is to be received and the exchange restored; and here the inconsistency does not prevent the acceptance of her proof. When the parties differ as to the genus, or species, or quantity or quality of the subject of the *khoolâ*, the word is with the wife, and the proof on the husband. So, also, if she should say, 'I made the *khoolâ* for nothing,' the word is hers, and the proof her husband's.

Agency for *khoolâ*.

When a woman appoints a person her agent for *khoolâ*, and then revokes the appointment, revocation is without effect if unknown to the agent; but if she should send a messenger to her husband for the same purpose, and then recall him before the message is delivered, the revocation would be good, whether known to the messenger or not. A man says to two persons, 'Make a *khoolâ* with my wife without anything,' and one of them does so: repudiation, however, does not take effect; but if two men were desired to make a *khoolâ* for a thousand, and one of them should say, 'I have made the *khoolâ*,' and the other, 'I have made the *khoolâ* for a thousand,' it would be lawful. If a man should appoint another his agent to make a *khoolâ* for so much, and the agent should say, 'I have made a *khoolâ* of such an one from her husband on so much,' it

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a release of it if still due. The judgment of the court, however, was founded on his opinion in preference to that of the Mufti, its other law officer, whose *futwa* expressly restricted the effect of the husband's allegation of the *khoolâ* to a case where the husband is plaintiff in the suit. (Appendix to Proceedings in Appeal, p. 51.) The learned Mufti seems also to have perceived, what was overlooked by the Cazee, that the defendant did not in reality plead a *khoolâ*, which would of necessity have implied something done by himself, but merely stated in his answer that 'his wife gave him a *khoolâ*,' and adduced in support of his allegation a writing which, though he called it a *khoolâ nama*, was not so in reality, as it professed to be only on her part, and was signed only by herself; whereas a proper *khoolâ nama* is not only bilateral, and the husband a necessary party, but he is the principal party to it.

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would be lawful, though the woman were not present; and although it has been said that one person cannot act as an agent for both parties in a *khoolâ*, yet this is deemed a precedent that he can; which is more agreeable to the Rewayut Asul, and is correct.

One person may represent both parties.

A youth, a madman, or a slave may lawfully be appointed by either of the parties to give or receive the *khoolâ* in his or her stead.

A mad or insane person may be agent in *khoolâ*.

When a man has made a *khoolâ* for his grown-up daughter on her dower and with her permission, it is lawful. When it is done without her consent, or subsequent sanction, and the father has not given security for the dower, the transaction is not lawful, and the *khoolâ* is without effect; but if he has given security repudiation takes effect; except, however, insomuch that it is not operative till the news reach her and she approves; and if she does not approve of it she may have recourse to the husband for her dower, and he can sue the father on his security.

A *khoolâ* made by a father for his adult daughter;

When a man has made a *khoolâ* for his infant daughter on her own property, it is not lawful as against her, and her dower does not drop, nor does the husband get any right to what belongs to her; but does the repudiation take effect? There are two reports, and, according to the most authentic, it does. If a husband should give a *khoolâ* to his infant wife on a thousand, and on condition that her father is to be a security for the thousand, the *khoolâ* takes effect, and the father is liable. When the *khoolâ* is made, without any security, for the infant's dower, the matter must stand over for her sanction, and if sanctioned she is repudiated, but her dower does not drop. When the *khoolâ* is between a husband and the mother of an infant, and the mother refers the exchange to her own property, or becomes security for it, the *khoolâ* is complete, in the same way as if it were with a stranger. But if she did neither would it be so? There are two reports on the subject, but according to the most authentic she would not.

for his infant daughter;

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for his infant son.

When a father has made a *khoolâ* for his infant son it is not valid, without any waiting for the son's sanction.

Khoolâ is lawful under compulsion.

Khoolâ is lawful when given by a drunken person, or one who is under compulsion, but the *khoolâ* of a youth under puberty, or an insane person, is void.

Khoolâ made by a woman in her last illness.

When a woman has entered into a *khoolâ* in sickness for the dower due to her by her husband, and then dies in her *iddut*, he is entitled to the less of his share in her inheritance, and the dower, if it came out of the third of her property; and if she have no other property than the dower, he is entitled to whichever may be the less of his share in the inheritance and the third; but if she does not die till after the expiration of the *iddut*, he is entitled to the dower from a third of her property.

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CHAPTER IX.

OF ZIHAR.

ZIHAR is derived from *zuhr*, the back, and, as rendered in the dictionaries, is the saying by a man to his wife, 'Thou art to me as the back of my mother.' In legal parlance it is a man's comparing, or likening his wife, or any undivided part of her, or any member which implies the whole person, to a part that it is not lawful for him to see of a woman that is perpetually prohibited to him, though only by fosterage or affinity. And it makes no difference whether the wife be free or a slave, or a *moodubburah*, *mookatubah*, or *oom-i-wulud*, or a *kitabeeah*. But it is a necessary condition of the woman that she should be a wife, and of the man that he should be one capable of making expiation, for *zihar* by a *zimmee*, a boy, or an insane person is not valid. If a man should marry a woman without her authority, then *zihar*[1] her, and she should subsequently sanction the marriage, the *zihar* would be void;[2] and though a slave, or a *moodubbur*, or *mookatub*, should *zihar* his wife, the *zihar* would be valid; yet *zihar* to a female slave, whether enjoyed or not, is not valid. So, also, if the likening were to a woman prohibited to the husband only by a temporary illegality, as a thrice repudiated wife, the *zihar* would not be valid. Definition.

The pillar of *zihar* is a husband's saying, 'Thou art to How it is constituted.

[1] Literally, 'back her,' though in a different sense from the expression as used in English. To avoid periphrasis and ambiguity, I use the original word, both as a verb and a substantive, as if it were English.

[2] Because, till the sanction, she would be unlawful to him, and the pillar of *zihar* is the comparison of one that is lawful to one that is not. *Inayah*, vol. ii., p. 280.

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me like the back of my mother,' or expressions of the like effect. When a man has said, 'Thy head is to me,' or 'thy face,' or 'thy neck,' or 'thy nakedness,' he becomes a *moozahir*.[1] So, also, when he has said, 'Thy body is to me like the back of my mother,' or 'the fourth,' or 'half of thee,' or any other undivided portion. But if the part mentioned be one that does not imply the whole person, such as the hand, or foot, *zihar* is not established. If he should say, 'Thy back is to me like the back of my mother,' or 'her belly,' or 'her nakedness,' or 'her thigh,' it would not be a *zihar*. But if the person herself is likened to any member of his mother that it is unlawful for him to look on, it is the same as likening to her back. So, also, if the likening be to any other woman among those who are perpetually prohibited to him, as his sister or aunt, or foster-mother, or foster-sister. When the likening is to what may be lawfully seen, as the hair, the face, the head, the hand, the foot, it is not a *zihar*. If he should say, 'Thou art to me like the back of thy mother,' he would be a *moozahir*, whether she were enjoyed or not; but if for mother, 'thy daughter' were substituted, it would only be in the case of the wife having been enjoyed that he would be so. If the likening were to the wife of his father, or of his son, it would be a *zihar*, whether the father or son had consummated with the wife or not. So, also, if the likening were to a woman with whom the father or son had illicit intercourse, according to Aboo Yoosuf, and this is correct. And if the likening were to the mother or daughter of a woman with whom the husband had illicit intercourse, it would be a *zihar*. But if he had only kissed a woman, or seen her nakedness with desire, and should then liken his wife to her daughter, he would not be a *moozahir*.

Effect of *zihar*.

The effect of *zihar* is to illegalize matrimonial intercourse, or any solicitation to it, till expiation has been made. And if intercourse should take place before expiation, pardon must be asked of God; but no other penalty

[1] Active participle of a conjugation that signifies reciprocal action. It means the 'comparer,' or husband who makes *zihar*.

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is incurred than the first expiation, and the husband should refrain from her till expiation. Though, after the *zihar*, he were to repudiate her irrevocably, and then marry her, sexual intercourse or any other enjoyment with her would be still unlawful till expiation. So, also, if the wife were a slave and he should *zihar* her, and then purchase her, so as to cancel the marriage by virtue of her becoming his property; or, if being free, she should apostatize from *Islam*, join herself to the *dar ool hurb* or a foreign country, be captured and then purchased by her husband; or if after *zihar*, he should himself apostatize from the faith (according to Aboo Huneefa), or if he should repudiate her three times, and she were then married to another husband, and should subsequently return to the first; in none of these cases would sexual intercourse be lawful till expiation. And if they should apostatize together and then return to the faith, they would still be under the *zihar*, according to Aboo Huneefa.

Distinction between a perpetual and a temporary *zihar*.

In all that has been said of the effect of the *zihar*, it is implied that the *zihar* is absolute and perpetual. But when it is limited, as if it were for a known time, as a day or month, or year, then, if he approach her within the time, expiation is obligatory on him, but if he do not approach her till the expiration of the time, expiation drops, and the *zihar* itself is cancelled.

Wife may insist on a restitution of conjugal rights. Remedy in case of refusal.

A wife is entitled to call on her *moozahir* husband to return to his matrimonial duties, and it is incumbent on her to prevent him from any enjoyment with her till he has made expiation. And if a *moozahir* should not make expiation, and the matter is brought before the judge, he is to imprison him till he does so or repudiates his wife. When he has said, 'I have expiated,' he is to be believed, unless it is known to be a lie.

Zihar takes effect without intention.

If a man should say to his wife, 'Thou art to me like the back of my mother,' he is a *moozahir*, whether he intend *zihar* or not, or had no particular intention; and though he should actually intend repudiation, there would still be nothing but *zihar*. So also if he were to say, 'I am a *moozahir* to thee,' he would be a *moozahir*, whether he intended it or not, and whatever he might

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intend, still it would be nothing but *zihar*. And, in like manner, if his words were, 'Thou art to me like the belly,' or 'thigh,' or 'nakedness of my mother,' it would in all respects be the same as if he had said, 'like the back of my mother.' If he were to say, 'Thou art *from* me as the back of my mother,' or 'to me,' or '*with* me,' or '*at* me,' he would be a *moozahir*. But if he should say, 'Thou art my mother,' though it is abominable to say it, he is not a *moozahir*; and similar to that would be his saying, 'O my daughter,' or 'O my sister,' and the like. And if he were to say to her, 'Thou art like my mother,' or 'as my mother,' intending repudiation, it would be irrevocable, and if he intended by it *zihar*, it would be according to his intention.[1] Even though he should say, 'If I have intercourse with you I have it with my mother,' nothing would be incumbent on him. When he has said, 'Thou art unlawful to me as my mother,'[2] intending repudiation, or *eela*, or *zihar*, it is as he intended; and if he had no intention it is *zihar*, according to Moohummud, whose *dictum* is said to be correct. A woman cannot be *moozahir* to her husband, according to Moohummud, and the *futwa* is with his opinion.

Condition of *zihar* as to the husband.

It is a condition of *zihar* that the husband be a person capable of making expiation, hence the *zihar* of a *zimmee*, a boy, or an insane person is not valid, as already mentioned. It is also a condition that he should not be a lunatic, astonished, pleuritic, or in a faint or asleep; and *zihar* by any one in these states is not valid. But it is not necessary that he be in earnest; so that *zihar* by one in jest is valid: nor that he be acting willingly or with design, so that the *zihar* of one under compulsion or a mistake is valid. Nor is it necessary that *zihar* be free from a stipulation of option, for it is valid with such a

[1] The expression is ambiguous, and he should be asked for an explanation. If he were to say it was to do her honour, the expression would also be taken according to his intention. *Hidayah*, vol. ii., p. 296.

[2] See *ante*, p. 232, where 'I am unlawful to thee,' will be found among the *kinaydt*.

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stipulation. *Zihar* by a drunken man is binding on him, so also by a dumb man when made in writing or by intelligible signs and with intention, as repudiation is valid in like circumstances. The husband of a *mujooseah* having embraced the faith, a *zihar* by him, before *Islam* has been submitted to her, is valid, for he has then become one capable of making expiation.

As to the woman.

Zihar is valid to an infant wife, or one under physical obstruction, or in her courses, or under purification after childbirth, or one who is insane or unenjoyed. If a man should give his wife a revocable repudiation, and then a *zihar* while she is in her *iddut*, the *zihar* is valid. But not so if given to a wife thrice or irrevocably repudiated, or to one under *khoolâ*, even though the *iddut* were unexpired. And if a *moozahir* should repudiate his wife continuously with the *zihar*, expiation would not be required, according to general agreement.

Zihar with a reference to time.

When a man has said to his wife, 'Thou art to me like the back of my mother to-morrow or after to-morrow,' it is one *zihar*; but if he were to say, 'Thou art to me like the back of my mother to-morrow, and when after to-morrow has come,' there would be two *zihars*, and if he should make expiation to-day, it would not suffice for the *zihar* which would take effect after to-morrow. If he were to say, 'Thou art to me like the back of my mother every day,' there would be only one *zihar*, which would be cancelled by one repudiation. But if he were to say, 'Thou art to me like the back of my mother *in* every day,' the *zihar* would be renewed each day, and when one day had passed, the *zihar* of that day would be void, but he would become *moozahir* by a new *zihar* for the next day; he might, however, have intercourse with her in the night, and if he should make expiation in the day, the *zihar* of that day would be void, but it would return on the morrow.

By association with another.

If a man should *zihar* his wife, and then associate another with her in the *zihar*, or say, 'Thou art to me like this,' intending *zihar*, it would be valid. And if he should say to a third, 'I have associated thee in the *zihar* of those

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two,' he would be a *moozahir* to the third for two *zihars*. If he should say to several wives at once, 'Ye are to me like the back of my mother,' he would be *moozahir* to them all, and liable in an expiation for each.

When suspended on a condition.

A *zihar* may be suspended or made dependent on a condition; as if one were to say, 'If thou enterest the house, or speakest to such an one, thou art to me like the back of my mother.' And if one should say to a stranger, 'When I have married thee, then thou art to me like the back of my mother,' and subsequently marries her, he is a *moozahir*. But if he should say to her, 'Thou art to me like the back of my mother if thou enterest the house,' it would not be valid; so that if he were subsequently to marry her, and she should enter the house, he would not be a *moozahir*, by general agreement. When a man has suspended *zihar* on a condition, and then irrevocably repudiated his wife before the occurrence of the condition, but the condition subsequently occurs while she is still in her *iddut*, the *zihar* does not descend. When a man has said, 'Thou art to me like the back of my mother, if God will,' it is not a *zihar*; but if the words were, 'if such an one will,' or 'if thou wilt,' it then depends on the will being expressed at the meeting. And when a man has said, 'If I approach thee, then thou art to me as the back of my mother,' he is a *moolee*; and if he abstain from her for four months, she is irrevocably repudiated by the *eela*, but if he approach her within the four months he is liable to expiation as for *zihar*; while, if he should marry her again after she has become repudiated by the *eela*, he would be a *moozahir*.

Section.

Of Expiation.

When expiation is obligatory.

It is obligatory on a *moozahir* to make an expiation if he intends to have intercourse with his wife after a *zihar*; but if he is content that she should remain unlawful to him, and has no intention of returning to matrimonial intercourse with her, he is not liable to expiation. When

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he has once resolved on renewing such intercourse, and expiation has in consequence become incumbent on him, he may be compelled to make it; but if he should again determine to refrain, the necessity for expiation would drop; and so, also, if either of the parties should die after the resolution to renew.

How it is to be made —1st, by emancipating a slave.

The expiation for *zihar* is the emancipation of an absolute slave, of whom the husband is the owner, and who is in possession of all his useful capacities, without any exchange, and with the intention of making expiation. It makes no difference whether the slave be *Mooslim* or infidel, male or female, an infant or adult. If a man should emancipate half of his slave, and then the other half before having intercourse with his wife, the expiation would be lawful; but not so, according to Aboo Huneefa, if the second half were not emancipated till after the intercourse. When a slave has been emancipated without any intention of expiation, but intention is superadded after the emancipation has taken place, the expiation is not lawful. A deaf slave is lawful for expiation if he can hear at all, but not so if he is totally deaf. And a dumb slave is not lawful, for want of one useful quality—which is speech. Where there is only a partial loss of the useful quality, it does not prevent the legality of the expiation; so that a slave with one eye is lawful. So, also, a slave that is maimed of one hand and one leg, if they are on opposite sides of the body; but if they are both on the same side, he is not lawful. A palsy in both hands is a disqualification, being the entire loss of one useful quality. A *mujboob* is lawful; but a slave that is blind, or has lost both his hands, or both his feet, a *moodubbur* and an *oom i wulud* (who are in a measure free already), and a *mookatub* who has paid a part of his ransom—are all unfit objects for expiation. If none of the ransom is paid, the emancipation of a *mookatub* is sufficient, and he becomes entirely released from the ransom. A eunuch, and a slave who has lost his ears, or his nose, or his lips, if still able to eat, are lawful; but not so one who has lost the thumbs of both hands, or three fingers on each hand. Females with

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physical obstructions to intercourse, and males who are impotent, are lawful; but not so the insane, nor one that is sick and *in extremis*; nor a male apostate, according to some, though he is lawful according to others; but a female apostate is lawful, according to all. The emancipation of a fugitive slave is also good, if he is known to be alive, but not of one who is absent without any information of where he is. A child at the breast is sufficient, but not a *fœtus* in the womb; and neither does the emancipation of a *hurbee* slave who is in the enemy's country expiate, though the case is otherwise with one who is within the *mooslim* territory. If a relative within the prohibited degrees comes into one's possession without his own exertions, as, for instance, by inheritance, to emancipate him is not enough for expiation, but it would be sufficient if he was acquired by exertion, and if, at the time of making the exertion, the *moozahir* intended expiation. When a man has incurred two *zihars*, and has emancipated two slaves without intending to particularize one to each *zihar*, the expiation is lawful. And it would be so likewise if a double expiation were made in any other of the ways hereafter mentioned, that is, by fasting four months, or feeding one hundred and twenty poor persons.

2nd, by fasting for two months.

When a *moozahir* cannot obtain a slave to emancipate, the proper expiation is for him to fast for two consecutive months which do not include the month of Ramzan,[1] nor the day of *fitr*,[2] or of *nuhr*,[3] nor any of the days of *tushreeh*.[4] If he should have intercourse with the wife to whom he is a *moozahir* during the day, whether through forgetfulness or

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[1] When it is an appointed duty for all *Mooslims* to fast.

[2] The day of breaking Lent; the festival which follows the Ramzan.

[3] The day of sacrifice, the 10th of *Zool Hijjah*. This and the former are both termed the greater and lesser *eed*, and it is unlawful to fast on either, being expressly forbidden by the Prophet.—See Lane's *Egyptians*, vol. i., p. 131.

[4] Three days after the *nuhr*—and so called because the flesh of the victim slain in them is dried—or because the victim should be slain only while the sun is shining.—*Freytag*.

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wilfully,[1] he must recommence the fast, according to Aboo Huneefa and Moohummud; and if it were wilfully in the day, the fast must be recommenced according to them all. When the intercourse is with another woman than the one to whom he is *moozahir*, then, if the intercourse be one which vitiates the fast, it must be recommenced, by general agreement; and if it be not one that vitiates the fast (as, for instance, if it occurred during the day through forgetfulness, or in the night, however it may be), there is no necessity for its renewal, according to general agreement. When the expiation is by fasting, and the fast is broken by reason of any cause, such as sickness or a journey, it must be recommenced. So, also, if the day of *fitr*, or of *nuhr*, or the days of *tushreeh* should intervene, the fast must be recommenced; and even though the husband should not avail himself of them, but should actually fast during these days, yet the fast must be recommenced. When he has fasted two months, by the appearance of the new moon, they are sufficient to expiate him, though each month were only twenty-nine days; but if he has not fasted by the moon, then if he should break the fast on the completion of the fifty-ninth day, still he must recommence; while, if he should fast fifteen days, and then a month by the moon (or twenty-nine days), and after that fifteen days more, they would suffice, according to the two disciples, though not so in the opinion of Aboo Huneefa. If the *moozahir* should eat during the fast of *zihar* through forgetfulness of his fast, it would do no harm. But though he should have fasted for two consecutive months, yet if he is able to emancipate a slave before sunset of the last day, he must do so, and his fasting is a mere voluntary absti-

[1] The definition of fasting is 'to refrain from eating, drinking, or sexual intercourse, from the dawn of day to sunset;' and when intercourse takes place during the day wilfully, there is a clear breach of the fast. Where, again, it is through forgetfulness during the day, or at night, whether wilfully or not, there is no breach of the fast. Still, the fasting must be recommenced, when it is with the woman herself; because the expiation should precede the intercourse with her. See *Hedaya*, vol. i., p. 338.

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nence. It is better for him, however, to complete the fast of that day; though if he should not do so, but break the fast, he is under no obligation to complete it. Though he should be able after sunset of the last day to emancipate a slave, his fast would suffice to complete his expiation.

Ability or inability to emancipate has reference to the time of expiation, not of *zihar*.

The wealth or poverty of the *moozahir* is to be regarded, not with reference to the time of the *zihar*, but with reference to the time of expiation; so that, though he were rich at the former time, yet if he were straitened in his circumstances at the latter, fasting would be sufficient for expiation; but not so if the circumstances were inverted. When a person is possessed of a female slave which is necessary to him, still emancipation is incumbent on him. In like manner, if he should have the price of a slave, in either of the two kinds of coin (*dirhems* or *deenars*); but no regard is to be had to his dwelling, or to the clothes that may be in it, except as to the excess of what may be necessary for his own use. When a poor man has a debt owing to him which he cannot recover from his debtor, he is to be accounted unable to expiate by property, and may do so by fasting; but when he is able to recover the debt from his debtor, it is not lawful for him to make expiation by fasting; and when the debts which he owes are equal to those which may be due to him, he may also expiate by fasting after he has paid his debts.

Fasting is the only expiation lawful to a slave.

No expiation, except by fasting, is lawful to a slave, even though he be a *mookatub*, or be working out his emancipation by labour; and if his master should emancipate for him, or feed the poor by his direction, there would still be no expiation, contrary to the case of a *fakeer*, for whom another may emancipate a slave or feed the poor. A master cannot prevent his slave from keeping this fast. The fast by a slave is fixed at two consecutive months.

When one is unable to emanci-

When the *moozahir* is unable to fast, he must feed sixty poor persons. In this respect the *fakeer* and *miskeen*[1]

[1] Both words are applicable to persons in want. By the term *fakeer* is to be understood a person possessed of property the whole

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are alike. It is not lawful to give to any one out of this expiation to whom it is not lawful to give out of *zukat* (or poor's rate), with the exception only of poor *zimmees*, to whom it is lawful to give out of this expiation, according to Aboo Huneefa and Moohummud, though a poor *miskeen* should be preferred. But it is not lawful to give any of it to poor enemies, though they should be living as *moostamins* within the *Mooslim* territory. When the *moozahir* has directed another to feed the poor for him, and it is done, the expiation is lawful; but the person so directed has no right of recourse against him on account of the food bestowed; for it is susceptible of being a *kurz* (or *mutuum* loan), or a gift, and recourse cannot be had by reason of the doubt. If, however, in giving the direction he had said, 'On condition that you may have recourse against me,' the person directed might have such recourse. The portion for each person is half a *saa*[1] of wheat, or a whole *saa* of dates or barley, or the value. So that if one *munn* of wheat be given, or two *munns* of dates or barley, it is lawful, as fulfilling the design, which is to feed and appease hunger, and that can be done by making up the complement of the one out of the other.[2] In reckoning the half *saa* of wheat, its flour and its meal are alike; and so in reckoning the full *saa* of barley, its flour and meal are alike. If, instead of the half *saa* of wheat, a half *saa* of good dates of equal value were rendered, it would not be lawful; and, in like manner, if less than half a *saa* of wheat were rendered, though equal in value to a *saa* of dates, it would not be lawful; the principle being that there can be no change of one of the things expressly enjoined for another of them, even though the substitute were of greater value. If one poor man were fed for thirty days, at half a *saa* a day, it would suffice for the purpose

pate or fast, expiation is to be made —3rd, by feeding sixty poor persons.

The fixed portion for each;

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of which amounts to less than a *nisab*; by *miskeen*, a person who has no property whatever. *Hedaya*, vol. i., p. 54. A *nisab* is the lowest amount assessable to *zukat*, or poor's rate.

[1] A dry measure containing four *moodd*, one of which is equal to 1½ lb. *Freytag*;—about 8 lbs. *Hedaya*, vol. i., p. 339, note.

[2] *Hidayah* and *Kifayah*, vol. ii., p. 309.

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of this expiation; but if the whole were given to one poor person in one day, it would not be lawful, except for that day. Nor would a whole *saa* to each one of thirty persons be sufficient except for thirty days; and the *moozahir* would still have thirty *saas* to give to other thirty persons —that is, half a *saa* of wheat to each. If a man were to feed sixty poor persons, by giving each a whole *saa* of wheat on account of two expiations, whether for the same woman or for two women, it would not be lawful, except on account of one of the two, according to Aboo Huneefa and Aboo Yoosuf; but if he were to give half a *saa* on account of one of the expiations, and then half a *saa* on account of the other, it would be lawful according to them all. And if a man should emancipate half of a slave, and fast for a month, or feed thirty poor persons, it would not be lawful for the expiation.

or two good meals a day.

If the *moozahir* should give the poor persons their breakfast and dinner,[1] and satisfy them, it would be lawful, whether they were satisfied with little or much. But if he should give breakfast to sixty, and dinner to sixty others, it would not suffice for expiation, unless another breakfast or dinner were added to one set of sixty. The breakfast and dinner should be of bread with some relish; and when it is barley bread, or bread of any kind of millet, a relish is necessary, in order that they may eat to the satisfying of their appetites; but not so when it is wheaten bread. If there were a sucking child in the number, it would not suffice; nor if some of the parties were satiated before beginning to eat. If one poor person were fed for sixty days, two satisfying meals a day, it would be lawful. But if 120 poor persons were fed at once, the *moozahir* would have to give one of the sets another satisfying meal. If breakfast is given and the value of a dinner, or a dinner and the value of a breakfast, it is sufficient.

The feeding, if interrupted, need not be recommenced.

The feeding should be before approaching the wife, who is under *zihar*; but if she should be approached in breach of the expiation, the feeding would not require to be recommenced.

[1] The two principal meals.

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CHAPTER X.

OF LIÁN.

LIÁN,[1] according to 'us,' are testimonies confirmed by oaths[2] on both sides, referring to a curse on the part of the man, which is a substitute for the *hudd-ool-kuzf*, or specific punishment of scandal,[3] and for *ghuzub* or wrath on the part of the woman, which is a substitute for the *hudd-oozzina*, or specific punishment of adultery.[4] Though a man should have slandered his wife several times, only one *lián* is incumbent on him. And all are agreed that *lián* is to be taken between spouses only once. It does not admit of forgiveness, or release, or composition: so that, if the wife should forgive her husband before the matter is brought before the judge, or should enter into a composition with him for property, the composition would not be valid, and she would be liable for restitution of the amount received in exchange, and might still demand the *lián*. Neither does it admit of agency; and if one of the parties should appoint an agent for *lián*, the appointment would not be valid; though an agency for proof is lawful, according to Aboo Huneefa and Moohummud. Definition.

The cause for *lián* is a husband's scandalizing his wife in such a manner as would call for the infliction of *hudd*, What occasions *lián*.

[1] Plural of *luânut* (*Freytag*), but also used in the singular as an irregular form for *mooláunut*, or 'reciprocal cursing.'—*Kifayah*, vol. ii., p. 316.

[2] The ordinary attestation by a witness in a court of justice is not upon oath.

[3] Which is eighty stripes if the slanderer be free, and forty if a slave.

[4] See *ante*, p. 1.

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if the parties were strangers to each other, though it induces only *lián* between married persons. Where a man has said to his wife, 'O adultress!' or, 'Thou hast committed adultery;' or, 'I have seen thee in the act of adultery,'—*lián* is obligatory. When a man has slandered his wife for adultery, and she is a person whose slanderer is not liable to the *hudd*, *lián* does not pass between them. As, for instance, when she has been enjoyed under only a semblance of right, or has previously been notorious for a loose life, or has borne a child of unknown paternity. If he should say to her, 'Thou wert joined in an unlawful joining;' or, 'wert enjoyed unlawfully,' there would be no *lián* and no *hudd*.[1] So, also, according to Aboo Huneefa, if the charge were of an unnatural offence.

Conditions of *lián*.

It is a condition that the parties be husband and wife, and that their marriage be a valid one, whether consummated or not; so that if he were to slander her, and then repudiate her three times, or irrevocably, there would be neither *hudd* nor *lián*.[2] In like manner, if the marriage were invalid, there is no *lián*, for he is not absolutely a husband. If a man should repudiate his wife three times, or absolutely, and then slander her, there would be no obligation to *lián*, by reason of the extinction of the marriage relation; but if he were to repudiate her revocably, and were then to slander her, the *lián* would be obligatory, unless the slander were after her death, when there would be no *lián*.[3]

Who are competent to the *lián*.

The persons who are competent to take the *lián* are those who are competent to be witnesses. So that it does not pass between spouses, both or one of whom has undergone the specific punishment for scandal, or is an absolute

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[1] Because the charge of *zina* must be express, otherwise there is no *hudd*.—*Hidayah* and *Kifayah*, vol. ii., p. 629.

[2] No *hudd*, because at the time of the slander the marriage was subsisting, and *lián* a necessary preliminary; and no *lián*, because the marriage is at an end.

[3] There would be no *hudd* for scandal in that case.—*Hedaya*, vol. ii., p. 63.

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slave, or infidel, or dumb, or under puberty, or mad; but it does pass between all others except these; and must, therefore, be imposed, though both the parties be profligates, or blind, for they are persons who are competent to give testimony, on the whole;[1] and if a deaf man should slander his wife, he would be liable to the *lián*.

When the husband is incompetent, he is liable to *hudd*.

Whenever *lián* drops by reason of incompetency to bear witness, and the incompetency is on the part of the man, he is liable to the *hudd*; but if it be on the part of the woman, there is neither *hudd* nor *lián*; and though they had both previously undergone the *hudd* for scandal, he would still be liable to it.

Legal effect of *lián*.

The legal effect of *lián*, as soon as it has passed between the parties, is to render sexual intercourse between them, and all excitement to it, unlawful; but a separation is not effected by the mere *lián*. So that if the husband should repudiate his wife while in this condition by an irrevocable repudiation, it would take effect; or if he should retract, by declaring that he lied, intercourse would again become lawful without a renewal of the marriage. Aboo Huneefa and Moohummud have said that the separation which takes place in *lián*[2] is an irrevocable repudiation, and that it puts an end to the marital power, and establishes the illegality of intercourse and of re-marriage while they remain in the state of *lián*.[3] It is a condition of *lián* that the wife shall demand it;[4] and if the husband refuses to take the *lián*, the judge should imprison him until he submits, or retracts by giving himself the lie; whereupon he would become liable to the *hudd* for scandal. If he take the *lián*, it is then obligatory on the wife to do so; and if she refuses, the judge should imprison her till

[1] Arab, *fee'l joomlut*, which may mean generally, or the majority, though the Hanifite sect reject their testimony. See *Hedaya*, vol. ii., pp. 671 and 682.

[2] That is, the separation which is made after the *lián*, either by the husband or the judge. See *post*, p. 338.

[3] That is, between persons who have taken the *lián*. See *post*, p. 343.

[4] This is a condition of the *hudd* of scandal, for which *lián* is the substitute on the husband's part.

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she takes it, or acknowledges the truth of the charge. It is better for the woman to abandon litigation, and refrain from suing; and if she should not abandon it, but persists in bringing the matter before the judge, he should ask her to abandon it, by saying, 'Abandon and refrain from this matter.' If she do so, good and well; but if she persist in her demand, she is entitled to do so, even though a considerable time should have elapsed; for this right is a right of the individual, and such a right does not drop by delay in prosecuting it.[1]

Form of *lián*.

The proper form of *lián* is for the judge to begin with the husband, who should bear witness four times, saying each time, 'I attest, by God, that I was a speaker of the truth when I cast at her the charge of adultery,' and that he should then say, the fifth time, 'The curse of God be upon him if he was a liar when he cast at her the charge of adultery;' and in all this he should distinctly point to her. The wo[illegible]at if he were to slande[illegible] times, saying either three times, or irrevocably, there [illegible] liar in the cha[illegible]r *hudd* nor *lián*.[2] In like manner if [illegible] upon me,' and saying, the [illegible] invalid, there is no *lián* [illegible] or God be upon me if he be a tru[illegible]nd. If a man [illegible] charge of adultery which he has cast upon me.' It is not a condition that she should stand up at the time of the *lián*, though proper. The *lián* rests on the word of testimony with 'us;' so that if he or she were to say, 'I swear by God,' &c. (instead of 'I attest'), the *lián* would not be valid.

After *lián* the parties are to be separated by a decree of the judge.

When both parties have taken the *lián*, the judge is to separate them; and no separation takes place till a decree is passed by the judge, directing the husband to make the separation by repudiating his wife; and if he refuse to repudiate her, the judge himself is to pronounce a separation between them; but before he does so there is no separation, the marriage remaining still in existence. So that the husband may repudiate her, or pronounce a *zihar*, or *eela*, and there are mutual rights of inheritance if either

[1] In the other offences liable to *hudd* or specific punishment, viz. theft, drinking, and fornication, the right is the right of God, and drops by delay.

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should happen to die. Yet, though they should both join, after the *lián* is over, in requesting the judge not to separate them, he cannot assent, but must make the separation notwithstanding.

Effect of a mistake in the decree.

If a judge should, by mistake, pronounce a separation before the completion of the *lián*, then, if the parties had respectively gone through the greater part of the form, the separation is operative; and if both or one of them had not gone through the greater part of the form, the separation is not operative. But if it were completed on the part of the husband, and the separation were then pronounced, before imprecation by the wife, it would be operative. And if the mistake were by beginning with the woman before the man, the judge may return to the woman, though if he decree the separation without doing so it still takes effect. If the *lián* were made before a judge who is removed or dies, the second judge ought to put the pa[illegible]repudiation, it would take effect according to Aboo Huneefa's act, by declaring that he lied, intercourse happen to the parties, or without a renewal of the marri[illegible] of separation, that would have prevented ve said that the sepa[illegible]es void; and this may happen by both or [illegible] parties becoming dumb after it, or apostatizing, or recanting, or slandering another person, and being subjected to the *hudd* for it, or by the woman's committing adultery; in which cases the *lián* would be void, and there would be no *hudd*, nor separation of the parties; but though one of them should become mad after the *lián*, the separation should still be made.

What is scandal, so as to call for *lián*.

If a man should scandalize the wife of another, and the other should say, 'I believe that she is what thou hast said,' he would be a slanderer of his own wife, so as to call for the *lián*; but if he should merely say, 'I believe,' without anything further he would not be a slanderer. If a man should say to his own wife, 'Thou art thrice repudiated, O adultress,' he would be liable to *hudd* without *lián*;[1] but if he were to say, 'O adultress, thou art repudiated

[1] The scandal being of the woman after she ceased to be his wife.

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three times, there would be neither *hudd* nor *lián*.[1] If he should say, 'O adultress, daughter of an adultress,' it would be scandal of both her and her mother; and if they should combine in suing for the *hudd* against him, a beginning must be made with the *hudd* for the mother, and then the *lián* would drop; but if the mother should make no demand, and the daughter alone should sue, the *lián* must be put to her and her husband, and he would then be liable to the *hudd* for scandal if the mother should afterwards sue for it; and in like manner if the mother were dead and the words had been, 'O adultress, daughter of an adultress,' the daughter may sue,[2] and if she does for both scandals together, he is liable to the *hudd* for the mother, and *lián* would drop; but if she should not sue on account of the scandal against her mother, and only for the scandal on herself, the *lián* would take effect.

Scandal of a *zimmeeah*, or slave wife, does not induce *lián*.

When a free man has slandered his wife who is a *zimmeeah*, or a slave, and the woman is then converted to the faith or emancipated, he is liable neither to *hudd* nor *lián*; but if the slave wife be emancipated and then scandalized by her husband, he is liable to the *lián* on account of the marriage still subsisting between them at the time of emancipation. If, however, she should choose to avail herself of her option, and be freed from the marriage, the *lián* would drop, and she would have no title to dower if she were unenjoyed; but if she do not make her choice until the *lián* has taken place, and a separation is made between them, he would be liable for half the dower; and in like manner if he had enjoyed her, and they were then separated by the *lián*, she would be entitled (besides her dower) to maintenance and lodging during her *iddut*.

Slander suspended

When scandal is suspended on a condition, neither *hudd* nor *lián* is obligatory, so that if a man should say to a

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[1] Being his wife at the time of the scandal, *lián* was the proper course, but that is now prevented by her ceasing to be so.

[2] By reason of the imputation on her own birth.—*Hedaya*, vol. ii., p. 61.

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woman, 'When I have married thee, then thou art an adultress, or 'Thou art an adultress if such an one will,' the words would be nugatory.

on a condition does not induce *lián* or *hudd*.

Scandal is scandal, whatever be the language in which the imputation of adultery is conveyed, and when applied to a female of nine years old, it incurs the penalty of *hudd*, and may be sued for when she attains to puberty; when she is under nine years, that is an excuse. But if a man were to say to his wife, 'I did not find thee a virgin,' it would not be scandal, according to general agreement, nor if he should say, 'I found with her a man in conjunction with her;' or 'Thou committedst *zina* under compulsion,' or 'with a boy.'[1]

Scandal may be expressed in any language.

If a man should say, 'Thou committedst adultery, and this pregnancy is the fruit of it,' they must both take the *lián* because of the scandal, as there is here express mention of *zina*; but the judge is not to negative the paternity of the child, because his order can have no effect on it before its birth, and also because of a prohibition by the Prophet.[2] When a man has said to his wife, 'This pregnancy is not of me,' there is no *lián*. This is according to Aboo Huneefa and Zoofr; but, according to the other two, if she should be delivered of a child within six months, the *lián* ought to be administered, and it is only when the delivery is beyond six months that there is no *lián*, and this is correct.[3] When the delivery is beyond six months (which is the shortest period of gestation according to Moohummudan lawyers) there is no certainty that she was pregnant at the time that he made use of the expression, and it is the same thing as if he had said, 'if thou art pregnant,' &c., and scandal cannot be validly suspended on a condition.[4]

Lian may be incurred by the denial of a child of which a wife is pregnant, but the denial does not affect the child,

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[1] There being no express charge of *zina* in the case.—See *ante*, p. 336, *note*.

[2] The reasons are from the *Doorr ool Mookhtar*, p. 262.

[3] Two authorities are cited; but the author of the *Hidayah* adopts the opinion of Aboo Huneefa, supporting it by an argument for which the reader is referred to the *Translation*, vol. i., p. 351.

[4] *Doorr ool Mookhtar*, p. 262.

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unless it is made after its birth.

When a man has denied the child of his wife after its birth, or at the time that he is receiving congratulations on the event, or necessaries connected with the birth are being purchased, his denial is valid, and the *lián* must be administered to him; but if he should not deny it till after this, though the *lián* is still to be administered, the *nusub*, or paternity of the child, is established. If, however, he were absent from his wife and not aware of the child's birth till informed of it, he would have, according to Aboo Huneefa, as much time for denial as is usually occupied with congratulations, or, according to the other two, the whole time of the *nifas*,[1] after receiving the intelligence; for the paternity does not become binding on a man till after the child's birth is made known to him, so that the time of receiving intelligence is like the time of the birth itself.

And a child cannot be disavowed that has been once acknowledged,

nor when *lián* drops.

When he has once acknowledged the child, either expressly or circumstantially,[2] his denial of it afterwards is not valid, whether it be at the time of the birth or after it. Express acknowledgment is saying, 'The child is of me,' or 'This is my child,' and circumstantial is silence when congratulated on it. Still, if he deny, he must take the *lián*. A man whose wife has been delivered of a child denies it by saying, 'This child is not of me,' or 'This child is of *zina*,' and the *lián*, for some reason or other, has dropped, the denial of paternity is not valid, whether he suffer the *hudd* or not. So also, if he be one of these who are competent to take the *lián*, but fails to take it, his denial is not valid. When a man has denied the child of his wife, who is a free woman, and she confirms the statement, there is neither *hudd* nor *lián*, and the child is held to be the offspring of both. If a man should deny the child of his wife, and they are both in such a condition as not to be able to take the *lián*, it is not a denial. So also if the denial were at a time that there

[1] The puerperal discharge. The extreme legal term is forty days, but it may be only for an hour.

[2] Arab, *Dulalutun*, manifestly by his conduct.

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could be no *lián*, though the impediment should afterwards be removed, as for instance, if she were a *zimmeeah* or a slave, and were afterwards converted to the faith or emancipated.

Form of the *lián* when the scandal is by the denial of a child,

When the scandal on a woman is by denying her child, the judge is to negative its descent or paternity, and assign it to its mother. The form of the *lián* in this case is as follows:—The judge is to direct the man, who is to say, 'I testify by God that I was a true speaker in what I imputed to her by denying her child.' And so, upon her side, she is to say, 'I testify by God that he was a liar in what he imputed to me by denying the child.

or when a charge of adultery and denial are combined.

When the slander is both by imputing *zina*, or adultery, and also by denying the child, both facts are to be mentioned in the *lián*, and the husband should say, 'I testify by God that I was a true speaker in what I imputed to her by *zina*, and the denial of the child;' and the wife should say, 'I testify by God that he was a liar in what he imputed to be by *zina*, and denying the child.' And when the judge has separated them after the *lián*, he is to affiliate the child to the mother; and Bushr has reported, as from Aboo Yoosuf, that it is necessary that the judge should say, 'I have separated between you, and cut off the descent of this child from him;' so that if he were not to say so, the paternity of the child would not be negatived. And this is stated in the Mubsoot to be correct.

Parties may re-marry after the *lián* on the transpiring of any fact that would have prevented it if known at the time.

When it is found after the *lián* that there was some impediment at the time which would have prevented it, the parties do not continue with respect to each other in the condition of *mootulamein*, or persons who have mutually taken it;[1] so that it is lawful for them to re-marry. And this may happen in various ways, as for instance, by his giving himself the lie,[2] and being subjected in consequence to the *hudd*; or by her giving herself the lie, or by one of them having slandered another person and suffered

[1] See *ante*, p. 337.

[2] That is, receding from the charge of adultery.—*Hedaya*, vol. i., p. 348.

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the *hudd* for it; or by one of them having been dumb, or the woman mad, or guilty of illicit intercourse; or if one of them should have apostatized and then returned to the faith; in all which cases it would be lawful for the parties to re-marry, according to Aboo Huneefa and Moohummud.

The *status* of the child of a *mooláunah*, or imprecated woman.

The child of a *mooláunah*, or imprecated woman, is to be regarded in some respects as if his paternity were established from her husband. So that it has been said that the testimony of such a child is not to be received for his father, nor the testimony of the father in favour of the child. In like manner, it is not lawful for the father to apply his *zukat* or poor's rate to the son, nor the son his to the father. So also, if the child of the imprecated woman should have a son, and the husband a daughter by another wife, and the son should marry this daughter, or the child of the imprecated woman should have a daughter and the husband a son by another woman, and they, too, should intermarry, the marriage would not be lawful. In like manner, if another man should claim this child, the claim would not be valid, though assented to by the child himself. In some other respects, however, the parties are to be regarded as strangers; and it has accordingly been said that one of them does not inherit from the other; nor is either liable for maintenance to the other. If the *mooláin*, or imprecating husband, give himself the lie, and claim the child after the judge has made a separation between the parties, and ascribed the child to its mother, and the child is alive, its descent is established from him, but he is liable to the *hudd*, whether the mother be alive or not. If the child be dead, leaving property, the father is not to be credited, unless the child have also left a son or daughter, in which case he is to be credited and allowed to participate in the inheritance, but is subjected to the *hudd*, on the ground of his acknowledgment of the slander.[1]

A charge of scandal

If a woman should bring a suit against her husband,

[1] *Fut. Al.*, vol. iv., p. 182.

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alleging that he had slandered her by charging her with adultery, and the husband should deny the charge, no testimony, except that of two just men can be received on the part of the wife in establishment of the charge; for neither the testimony of women, nor testimony to testimony, nor the letter of a judge to a judge, can be received in proof of it, any more than they can be received in establishing a charge of scandal against a stranger. If the wife should produce two male witnesses, and the husband should then produce two male or one male and two female witnesses, to her admission of the truth of the charge, *lián* would drop, and he would not be liable to the *hudd*. And if she have no proof, but desires that the husband be put on his oath, she has no right to demand it. Nor if the husband should plead her admission, and desire that she be sworn, has he any right to her oath. If he should produce four witnesses to the charge of adultery against her,[1] he would not be liable to the *lián*, but she would be subject to the *hudd* for adultery. And even if the husband himself were one of the four, provided that he had never previously been guilty of slander, their testimony would be received, and the *hudd* inflicted on her.

by a wife against her husband requires two male witnesses;

and failing these, she is not entitled to his oath.

Charge may be met by a counter-charge of adultery, and proof by witnesses,

But if the husband had first slandered her and should then come with three witnesses besides himself who should slander her, then, the witnesses would be subjected to the *hudd*,[2] and he to the *lián*; and if he and three should bear witness that she had committed adultery, they, the witnesses, not being just persons, neither she nor they would be subjected to the *hudd*,[3] nor the husband to the *lián*. If a man who has slandered his wife should pro-

or of her confession.

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[1] The law requires *four* witnesses.

[2] The husband's testimony being excluded, there are only three witnesses, who being not competent to establish the charge, their allegation is slander. See *Hedaya*, vol. ii., p. 42.

[3] That is, neither she to the *hudd* for adultery, nor they to the *hudd* for slander. The husband is here supposed to be a competent witness, and the number of witnesses being complete they are not chargeable with slander, though the woman has the benefit of the doubt arising from their questionable character. *Ibid.*, p. 43.

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duce two witnesses to her having acknowledged the adultery, the *lián* would drop from the husband, but she would not be liable to the *hudd* any more than she would be on her own single confession.[1] If he plead generally that his wife is an adultress, or that she has already been enjoyed unlawfully, he is liable to the *lián*; but if he claim to adduce proof that she is as he has alleged, the matter may be postponed till the rising of the judge, and if he should then produce his witnesses, good and well, if not, the *lián* must be administered to him. If the husband should say, 'I slandered her when she was a child,' and she allege that he slandered her after she was adult, the word is with him, but the proof is with her. If she should sue him for an old slander, and adduce witnesses, it would be lawful for her to do so, but if he should adduce proof that he repudiated her after that revocably, and courted and married her again, there would be neither *lián* nor *hudd* between them.

[1] The confession must be repeated four times to justify conviction for *zina*.

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CHAPTER XI.

OF THE IMPOTENT.[1]

Definition.

AN impotent person is one who is unable to have connection with a woman, though he has the natural organs; and a person who is able to have connection with an enjoyed woman, but not with a virgin, or with some women but not with others, whether the disability be by reason of disease, or weakness of original constitution, or advanced age, or enchantment, is still to be accounted impotent with respect to her with whom he cannot have connection.

Procedure on wife's complaint.

When a woman brings her husband before the judge, and sues him, demanding a separation on the ground of impotency, the judge is to ask him if he has had intercourse with her or not; and if he should admit that he has not had intercourse with her, the case is to be adjourned for a year, whether the wife be an enjoyed woman or a virgin. If the husband should deny the charge, alleging that he has had intercourse with her, and she is an enjoyed woman, his word is to be taken, accompanied by his oath that he has had intercourse with her; and if he should swear to that effect, her right is void; but if he refuse to swear, the case is to be adjourned for a year. If she should allege that she is still a virgin, an inspection by women is to be ordered; for though one woman is sufficient, yet an inspection by two is more cautious and more to be relied on. If they should declare her to be an enjoyed woman,

Case to be adjourned for a year.

[1] Arab, *Inneen.*

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the word of her husband is to be taken with his oath; and if he should swear, her right is void; while if he refuse, the case is to be adjourned for a year. If they should declare her to be a virgin, her word as to non-intercourse is to be received without oath. When the fact is ascertained that there has not been any intercourse between the parties, the judge is to adjourn the case for a year, whether the man require it or not, and to take witnesses to the fact of the adjournment, and write down the date.

How the year is to be computed.

The year is to commence from the time of litigation; and there can be no proper adjournment except by the judge of the town or city; no regard being paid to postponements by the parties themselves, without the intervention of a judge. The adjournment is to be regulated by the lunar year, according to the Zahir Rewayut, confirmed by the *Hidayah*;[1] but there are several other authorities in favour of computation by the solar year; while Kazee Khan and Zuheer-ood-deen were of opinion that computation by the solar year is allowable by way of precaution, and according to the Khoolasa the *futwa* is so. According to Hulwaee, the solar year is 365 days, a quarter of a day, and $\frac{1}{120}$th part of a day,[2] while the lunar year is 354 days. The days of her courses, and the month of Ramzan, are all to be taken as falling within the year; but not so any days in which he or she may be sick. If then he should be sick during the year, the period of adjournment is to be enlarged by the number of days of his illness. But if he should perform the *hujj* (pilgrimage to Mecca), or should be absent, no allowance is to be made for the time so occupied. It is different, however, when she goes on a pilgrimage, or is otherwise absent; for the time so occupied by her is not to be reckoned against him. When a woman finds that her husband is sick and unable for intercourse, the case is not to be adjourned until he is well, however much the disease may be prolonged. And if he should be in prison, and his wife prevented from access to him in the prison, the time is not to be reckoned

[1] *Hedaya*, vol. i., p. 357.

[2] 365 days, 6 hours, 12 minutes.

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against him; but if she is not prevented from access, and opportunity is offered for retirement, the time is to be reckoned; but not so when there is no such opportunity; and it makes no difference though the imprisonment should be on account of her dower. If the woman be imprisoned on any account, and the husband is allowed access to her with free opportunity for retirement, the time is to be reckoned, but otherwise not.

Procedure on renewal of the complaint after the expiration of the time.

When the period has expired, and the woman comes again to the judge, alleging that her husband has not had connection with her, while he asserts that he has had it, then, if she were at first an enjoyed woman, his word is to be taken with his oath, and if he should swear, her right is void, but if he refuse to swear, the judge is to give her an option; and if the woman should say, 'I am still a virgin,' there must be an inspection by women (one will suffice, but it is more cautious to have two), and if they should say she is an enjoyed woman, her husband's word is to be taken with his oath; but if they should say that she is a virgin, or the husband should admit that he has not had intercourse with her, the judge is to give her an option to separate. If she should choose to abide by her husband, or should arise from the meeting, or the assistants of the judge should raise her from it, or the judge himself should rise, before she has made her choice, the option is void. Such is the report as from Moohummud, and the *futwa* agrees with it. If she should choose a separation, the judge is to order the husband to repudiate her irrevocably, and if he refuse, the judge himself is to pronounce the separation. The separation is one irrevocable repudiation, and the woman is entitled to her full dower, and is under an obligation to keep *iddut* if there had ever been a valid retirement; but if her husband had never retired with her, there is no *iddut*, and she has only half the dower if any had been named, or a *mootaut*, or present, if none was mentioned.

Wife's option.

Decree of separation.

Wife's right is not barred by delay

If the prescribed period has passed, and the woman delays for a time to bring the matter again before the judge, her right is not cancelled, even though they should

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in proceeding with the case after the expiration of the time.

have mutually agreed to lie together during the interval. But if the man should ask the judge to extend the time for another year, or a month, or more, he ought not to do so without the consent of the woman; and though she should consent, she may retract, whereupon the fresh period is to be cancelled and the choice again given to her.

The separation is cancelled by a previous acknowledgment of intercourse before it, and claim entirely barred if intercourse has ever taken place, or she was aware of the impotency at the time of the marriage.

When the judge has made a separation between the parties, and witnesses afterwards testify that the woman had acknowledged previous to the separation that the man had connection with her, the judge's separation is void; but if the acknowledgment were not till after the separation it is not to be credited.

If intercourse should once have taken place between married parties, though the husband should subsequently become weak, the wife has no choice; and if she knew at the time of the marriage that the man was impotent and unfit for women, she has no right to raise the question afterwards. But if she did not know it at the time, and only afterwards became aware of it, she is entitled to raise the question, and her right to dispute it is not cancelled, however long the time may be till she is dissatisfied with her condition. When the husband of a female slave is impotent, the option of separation is with her master, according to Aboo Huneefa, and the *futwa* is so.

Case of an eunuch.

As time is allowed to an impotent person, so also the case of an eunuch is to be adjourned in the same manner; also that of an old man, though he should say that he has no hope of having intercourse with her.

Of physical obstruction in the wife.

When the wife of an impotent person has herself a physical obstruction to generation, there is to be no adjournment.

Of a *mujboob*.

And when a wife has found that her husband is a *mujboob*, she is to be allowed an option at once, without any adjournment of the case. But if a man has once had intercourse with his wife, and is subsequently made a *mujboob*, she has no option; nor if she were aware at the time of her marriage that he was a *mujboob*.

Case of other defects.

When a defect is found in a wife, the husband has no option; nor a wife any option when her husband has

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madness, or leprosy, or elephantiasis. But Moohummud has said that if the madness be occasional, the case is to be adjourned for a year, like that of an impotent person; and if, at the expiration of the year, the madness is not cured, the woman has an option; and that if the madness be continued, the case is like that of a *mujboob*, and we have adopted this opinion.[1]

[1] The authority cited is the *Havee'l Koodsee;* but the 'we' may mean the compilers of the *Futawa Alumgeeree.*

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CHAPTER XII.

OF IDDUT.

Definition of *iddut*.

When it is incumbent on a repudiated woman.

IDDUT is the waiting for a definite period, which is incumbent on a woman after the actual or apparent dissolution[1] of marriage, and is made obligatory by consummation, or the husband's death.[2] When a man has married a woman by a lawful contract, and has repudiated her after consummation, or after a valid retirement, it is incumbent on her to observe an *iddut*. But if the marriage were invalid, and the judge should make a separation between the parties before consummation, though after a valid retirement, the *iddut* would not be incumbent; while, if the separation should not take place till after consummation, she would have to observe an *iddut*, reckoning from the time of separation; and so, also, in the case of a separation effected without judicial decree. Any separation without repudiation comes within the same meaning in respect of *iddut*, as, for instance, when it takes place under the options of puberty and emancipation, or for want of equality, or by reason of one of the married parties becoming the property of the other, because it has been made incumbent for the purpose of ascertaining the state of the womb.

It is not incumbent after *zina*,

Iddut is not due for connection under a marriage contracted by a *fuzoolee*, nor for *zina*, or illicit intercourse,

[1] Arab, *zuwal*, which means literally a falling off, or decline; and marriage is supposed to continue for some purposes during the *iddut*.

[2] *Hidayah* and *Kifayah*, vol. ii., p. 332.

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according to Aboo Huneefa and Moohummud. When a man has said, 'Every woman that I marry is repudiated,' and having forgotten what he said, marries and consummates with his wife, she is repudiated, and he is liable for one dower and a half.[1] An *iddut* also is incumbent on the wife, and the *nusub*, or paternal descent of the issue, is established from the husband. or illicit intercourse.

Four women are not liable to *iddut*: namely, first, a woman who has been repudiated before consummation; 2nd, a *hurbeeah*, or alien, who has come, under protection, into 'our' DAR, having left her husband in the DAR-OOL-HURB; 3rd, two sisters married by one contract which has been cancelled; 4th, more than four women connected together in one contract which has been dissolved. Four women who are not subject to it.

When a man has repudiated his wife absolutely, or revocably, or three times, or a separation has taken place between them without repudiation, and she is free and subject to the monthly courses, her *iddut* is three terms of the courses, whether the free woman be *mooslim* or *kitabeeah*. The *iddut* of one who, from extreme youth or old age, is not subject to the courses, or who, though she has arrived at the age of puberty, has never menstruated, is three months. So also of one who has seen the discharge for a day, after which it has disappeared, the *iddut* is by months; but if the discharge has appeared for three days and then ceased, the *iddut* is by courses; while if it continue for anything less than three days the *iddut* is by months. When a young girl, who is under *iddut* by months, menstruates, the reckoning is void, and she must commence anew by courses. When an *iddut* by months has become incumbent, either for repudiation or death, and it has happened to commence on the first day of the month,[2] regard is to be had to the end of the month, though it should fall short of thirty days; but if it commenced in the middle of the month, then, according to Aboo Huneefa and one report of Aboo Yoosuf, regard is The *iddut* of repudiation for a free woman is three terms of courses, if she is subject to them. Otherwise, it is three months.

[1] See *ante*, p. 134 *et seq.*

[2] That is, the appearance of the new moon.

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to be had to the number of days; and ninety days are to be reckoned for a repudiation, and one hundred and thirty for a death. If a woman be repudiated in the evening of the first day of the month, and she is one of those whose *iddut* is reckoned by months, the computation is still to be by natural months, no regard being paid to the passing of part of a day; but if the commencement should not take place till the second or third day of the month, then the full number of days must be completed. If the repudiation should take place during the courses, the *iddut* is three full courses, without regard to the one in which the repudiation was given.

The *iddut* of repudiation for a slave is two terms of the courses, or a month and a half if she is not subject to them.

The *iddut* of an absolute slave, or a *moodubburah*, *oom-i-wulud*, or *mookatubah*, is two terms of the courses after repudiation or cancellation; or if she be not subject to the courses, it is a month and a half. And a *moostisah*, or slave working out her emancipation, is like a *mookatubah*, according to Aboo Huneefa, but like a free woman according to his two disciples.

The *iddut* of death or separation for an invalid marriage is the same as the *iddut* of repudiation for one that is valid.

When a man has consummated with a woman under a semblance of right, or a marriage that is invalid, he is liable for the dower, and she to an *iddut* of three courses if she be free, and two if a slave, and that, whether her husband have died leaving her surviving, or has separated from her while living; while, if from extreme youth or old age, she is not subject to the courses, her *iddut* when free is three months, and one month and a half when a slave. When a man has purchased his wife, having already consummated with her, the marriage is rendered invalid, but no *iddut* is required so far as he is concerned; so that his connection with her is not prohibited; but she is his *mooâtuddah*,[1] with respect to others, and he cannot bestow her in marriage to another man, until she has had two returns of her courses. When a *mookatub* has purchased his wife, the marriage is not invalid; and if he is unable to complete his ransom, the marriage remains as before; but if he pays the amount agreed

[1] Woman in her *iddut*

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upon, and is emancipated accordingly, the marriage is then invalidated, though no *iddut* is incumbent on the wife.

The *iddut* of a pregnant woman continues till her delivery, whether she be free, an absolute slave, or a *moodubburah*, *mookatubah*, *oom-i-wulud*, or *moostisah*, and also whether she be a *Mooslim* or *kitabeeah*, or the *iddut* were occasioned by repudiation, death, relinquishment, or connection under a semblance of right, and whether the pregnancy be such that the *nusub*, or paternal descent of the issue, is established or not, as, for instance, where a man has married a woman already pregnant by *zina* or fornication.

The *iddut* of a pregnant woman is till her delivery.

If a woman be an *ayessah*, that is, one who has despaired of having issue, and free, her *iddut* is three months. But if, after beginning to reckon by months, she should perceive the discharge, she must begin anew and reckon by courses, that is, when it has come in the usual way, for its return negatives her despair. When an *ayessah* has kept part of her *iddut* by months, and then is pregnant, the *iddut* is to be completed by delivery.

The *iddut* of an *ayessah*, or one that despairs of issue is three months, if free.

The *iddut* of a free woman for the death of her husband is four months and ten days, whether the marriage were consummated or not, or the woman be a *Mooslimah* or *kitabeeah* married to a *Mooslim*, or an infant or an adult, or *ayessah*, or her husband were free or a slave, and whether she have menstruated within the period or not, provided she does not appear to be pregnant. This *iddut* is not incumbent except for a valid marriage. And by ten days are meant ten nights and ten days, according to general agreement.

The *iddut* of death for a free woman is four months and ten days.

When a married woman is a slave, and her husband has died leaving her surviving him, her *iddut* is two months and five days; and the same rule applies to a *moodubburah*, *mookatubah*, *oom-i-wulud*,[1] and *moostisah*, according to Aboo Huneefa.

For a slave, two months and five days.

[1] When the master of an *oom-i-wulud* dies, or she is emancipated, it appears that she should keep an *iddut* of three months as a *firash*, or concubine.—*Hedayah*, vol. i., p. 363.

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Case of a wife whose husband being absent, she receives information of his death, and re-marries.

When the wife of an absent man has been informed by one man of his death, and by other two that he is alive, and the first informant has attested that he saw his death or his dead body, and is, besides, a just man, she is at liberty to observe an *iddut*, and to intermarry with another, that is, provided that the informants have not given a date to their intelligence; but if they give a date, and the date of those who speak to his being alive is the later date, their testimony should be preferred. The husband of a woman being absent, a man came to her and informed her that he was dead, whereupon she and the people of the house did what is usual in cases of such calamity, and she, having kept her *iddut*, married a second husband, who consummated with her, after which there came another man, who informed her that her first husband was still alive, saying, 'I have seen him in such a city.' In these circumstances it was asked, What is the condition of her marriage with the second man, and is it lawful for her to abide with him; or what are she and the second husband to do? and the answer was, If she believed the first informant, she cannot believe the second, and the marriage between her and the second husband, therefore, is not nullified, and they may both lawfully abide by it.[1]

Case of the widow of a boy.

If a boy should die, leaving his wife surviving him, and the signs of pregnancy appear in her after his death, she is to keep *iddut* by months; but if she were pregnant at the time of his death, the *iddut* is to be by delivery, on a favourable construction of law. In neither case, however, is the *nusub*, or paternal descent of the child, established. If the birth take place within six months from the death of the boy, conception must have taken place in his lifetime; but if the birth does not happen till six months or more have elapsed from the time of his death, then it is evident that conception must have taken place after it.

[1] The Buhr-oor-Raik is cited as the authority, but the name of the person who gave the answer is not mentioned.

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When an insane person dies, leaving his wife surviving, the rules with regard to *iddut* and the child are the same as in the case of one of sane mind.

The *iddut* of death for an insane husband same as for one that is sane.

When a man has repudiated his wife and then died, if the repudiation were revocable, the *iddut* is to be reckoned from his death, whether the repudiation were given in a state of health or sickness; but if repudiation were absolute or triple, and the woman does not inherit from him by reason of his having been in health at the time of the repudiation, the *iddut* is not to be reckoned from death; while, again, if she does inherit from him by reason of his having been sick at the time, and subsequently dying before the expiration of the *iddut*, she is to keep *iddut* for a period of four months and ten days, during which there must be three returns of the courses; so that if these should not be completed during the period, the *iddut* is to be carried on till their completion. A young girl being repudiated by her husband, three months of her *iddut* have passed except one day, when the courses appear; in these circumstances, the *iddut* is not completed until they have occurred three times. A man having repudiated his wife revocably, she has kept *iddut* for three terms of her courses except one day, when the husband dies: four months and ten days are now incumbent on her. When a repudiated woman has kept *iddut* for one or two terms of the courses, and they then cease, the *iddut* is not completed until she despair of their return, whereupon she must commence anew by months.

How the *iddut* is determined when death follows repudiation.

The *iddut* of repudiation commences from the repudiation, and that of death from the death; so that if the events are not known until the period of the *iddut* has actually passed, it is held to have expired.[1] The *iddut* for

From what dates the *idduts* of repudiation and death are held to run.

[1] The authority cited is the *Hidayah*, but it goes on, in the original, as follows:—'And our sheikhs have decreed with respect to repudiation, that it (the *iddut*) shall commence from the time of the acknowledgment (*ikrar*), to avoid 'the suspicion of collusion.' According to the *Kifayah* (vol. ii., p. 243), by *ikrar* is meant acknowledgment of a debt on death-bed, which the parties might collude to render valid by pretending that the *iddut* had expired before it was

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an invalid marriage runs from the separation, or the day that the man has determined on abandoning the connection. When a man has repudiated his wife and then denied the fact, whereupon she establishes it against him by proof, and the judge pronounces a decree of separation, the *iddut* is to be reckoned from the time of the repudiation, not from the decree.

Two *idduts* may be running at the same time.

Two *idduts* may be running on to accomplishment at the same time, whether they be of the same kind or of different kinds. As an example of the first, take the case of a repudiated woman, who, having menstruated once, is married to, and enjoyed by, another man, after which they are separated, and her other occurrences of the courses take place after the separation; in these circumstances, the second husband may lawfully re-marry her, for the *iddut* due to the first has expired; but another cannot marry her till the expiration of three terms of the courses after the separation, because the *iddut* due to the second is still in existence with regard to a third party; and if the first repudiation were revocable, the first husband might recall her before she had twice menstruated after separation from the second; and when three terms of the courses have occurred after separation from the second, the two *idduts* expire together. An example of the second is found in the case of a woman whose husband has died, and who is enjoyed under a semblance of right; here her first *iddut* is completed by four months and ten days, and her second by three courses which appear during the months.

Iddut of a *kitabeeah.*

When a *kitabeeah* is married to a *Mooslim*, she is liable for what a *Mooslim* wife would be liable to in the same circumstances; that is, if free, she is like a free *Mooslimah*, and if a slave, like a *Mooslimah* slave; but when married to a *zimmee*, no *iddut* is incumbent on her, either for death or separation, according to Aboo Huneefa, if that be agreeable to their own religion. According to the disciples, however, she is liable.

made. But Mr. Hamilton, following no doubt the Persian translators, has rendered the passage as if by the *ikrar* were meant a public declaration of divorce.—*Hedaya*, vol. i., p. 366.

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CHAPTER XIII.

OF HIDAD,[1] OR LAYING ASIDE OF ORNAMENTS.

A woman during *iddut* must avoid the use of ornaments and everything intended to adorn or beautify the person.

THE observance of *hidad* is incumbent on every woman during her *iddut*, who is a *Mooslim*, and has been irrevocably repudiated, or whose husband has died, leaving her a widow. By *hidad* is to be understood, abstaining from the use of perfumes, oil, *kohl*,[2] *henna*,[3] and *khuzab*,[4] and from the wearing of perfumed clothes, and such as are tinged with safflower, or are red, or have been coloured with saffron, except when the colour is fast and does not fly in washing; and from the putting on of fine linen, or silk, whether floss or thrown, or ornaments, and from beautifying the person or combing the hair. It is only when the clothes above mentioned are new that they fall within the prohibition of beautifying the person, for when threadbare they may be worn without any objection. And combing with a comb, the teeth of which are wide apart, is not objected to; but the use of any other is abominable, for it cannot be required except with a view to the beautifying of oneself. Abstinence is required only when there is freedom of choice; and there is no objection to the use of oils and *kohl* when necessary, as in the case of headache, or for relieving the eyes. When a woman is poor, and has only one coloured garment, there is no

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[1] The original meaning is to forbid, or prohibit.—*Inayah*, vol. ii., p. 278.

[2] A pigment used for blackening the inside of the eyelids.

[3] Red dye used for staining the palms of the hands.

[4] Tingeing (the nails or hair) with cypress or saffron.

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objection to her wearing it, when done without the intention of beautifying herself.

Women on whom this is not incumbent.

Hidad is not incumbent on a little girl, nor on a grown woman who is insane, nor on a *kitabeeah*,[1] nor a woman in *iddut* for an invalid marriage, nor on one who has been repudiated revocably. But if an infidel woman should be converted to the faith during her *iddut*, all that is incumbent on a *Mooslim* woman for the remainder of it is incumbent upon her. *Hidad* must be observed by a female slave who is married, whether it be for death or irrevocable repudiation; and it is in like manner incumbent on an *oom-i-wulud*, a *moodubburah*, a *mookatubah*, and a *moostisah*; but not on an *oom-i-wulud* who is in *iddut* for the death of her master, or in consequence of emancipation.

A woman should not be courted during her *iddut*.

It is not lawful for a stranger openly or expressly to court or solicit a *mooâtuddah*, or woman in her *iddut*, whether she have been irrevocably repudiated, or her husband has died leaving her a widow; but in the case of the widow he may indirectly propose for her. The manner of doing this is to say to her, 'I wish to marry,' or 'I love a woman with such qualifications' (describing those of the lady herself); or he may say, 'You are good,' or 'beautiful,' or 'have inspired me with admiration,' or 'for me there is none like thee,' or 'I hope that God may make a junction between me and thee.'

A free woman in *iddut* for separation should confine herself to the house. But a widow may go abroad; also a slave on her master's service.

When a woman is in *iddut* for a valid marriage, and is absolutely free, adult, sane, and a *Mooslim*, and has freedom of choice, she ought not to go out by night or by day, whether the repudiation were triple, irrevocable or revocable. But a widow may go out by day and part of the night, though she ought not to sleep from home; and a *mooâtuddah* for an invalid marriage may go out, unless forbidden by her husband. A slave in her *iddut* may go out on her master's service, whether the *iddut* be for death, or *khoolâ*, or repudiation, revocable or irrevocable; but if she is emancipated during her *iddut*, whatever is incumbent on a free woman is incumbent on her,

[1] If not married to a *Mooslim* see *ante*, p. 358.

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for the remainder of it. A *kitabeeah* may go out with the permission of her husband, but not otherwise, whether the repudiation be triple, or irrevocable, or revocable; but when the *iddut* is for her husband's death, she may even sleep from home. A free *Mooslim* woman is not at liberty to go out without the permission of her husband; but a girl may do so with his permission, though the repudiation were revocable; and if it were irrevocable, she may go out without his permission, unless she be near to puberty. An *oom-i-wulud*, when emancipated by her master, may lawfully go out.

Iddut should be kept in the house where the woman is residing when the occasion for it takes place.

A *mooâtuddah* should keep her *iddut* in the house where she was residing at the time when the separation from her husband, or his death, took place. If she were on a visit to her friends, or in any other than her own house at the time of the occurrence, she should remove to her own house without delay. If she is under any apprehension of the house falling down, or is alarmed for her property, or the house is a hired one, and she is unable to pay the rent during the *iddut* for death, there is no objection to her removing. And if the house belonged to her husband, and he has died, leaving her a widow, and her share of it (by inheritance from him) is sufficient for her accommodation, and entire seclusion from the other heirs who are not within the forbidden degrees to her, she should live in her share of the house; but if the share be insufficient for these purposes, or the heirs turn her out, she may lawfully remove from it; while if they allow her to occupy their portions of the house for rent, and she is able to pay it, she has no right to remove from the house. When a man has repudiated his wife three times, or once absolutely, and has only one apartment, he must put up such a curtain or screen between him and her as would prevent their residing in it from being a retirement with her if she were a stranger. If he be a profligate, and she is under any apprehension from him, she may live in another house; but it is better for him to leave it; or the judge may, if he think proper, place a woman with her, in whom he can confide, to protect her.

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A woman in *iddut* should not go on a journey.

A *mooâtuddah* should not go on a journey, either for pilgrimage or other cause, nor should her husband take her on a journey with him; but if he do so without intending to recall her, it is not a revocation. A *mooâtuddah* is not obliged to confine herself to her own room, but may freely go out into the yard of the house, or into the other rooms, provided they are not occupied by other persons.

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BOOK IV.

OF SLAVERY.

CHAPTER I.

OF THE ORIGIN OF SLAVERY.

THE original condition of the race of Adam is freedom.[1] But for their security in this condition, one of two things is necessary; religion (by which is meant the Mussulman faith), and the protection of the Mussulman territory,[2] which is essentially free.[3] This protection can be obtained by unbelievers only on the condition of submission. Moreover, it is supposed to be the duty of all men to embrace the Mussulman religion, or to submit to the dominion of the true believers; and until they adopt one or other of these alternatives they are *Hurbees*, or enemies, and deemed to be *moobah*, or optional,[4] as a consequence or punishment of their fault.[5] They are even classed with inanimate things, so that all unbelievers who are not *zimmees*, or the subjects of some Mussulman state, are thus liable to be reduced to a state of property,[6] like things which were originally common by nature.

Man is by nature free.

When the Imam or head of the Mussulman community

Infidels conquered

[1] *Hidayah*, vol. ii., p. 823.
[2] *Ibid.*, p. 709.
[3] *Ibid.*, p. 828.
[4] That is, something which is the property of no particular person, and may by law become the property of a *Mooslim*.
[5] *Hidayah*, vol. ii., p. 757.
[6] *Inayah*, vol. ii., p. 755.

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by Mussulmans may be reduced to slavery.

has subdued a country by force of arms, prisoners, or such of the inhabitants as have fallen into his hands, are at his absolute disposal, and may be lawfully reduced to slavery, or even put to death.[1] Before commencing war, it is proper to invite the inhabitants of the country about to be invaded to embrace the true faith; but, as they are without the pale of the law, no penalty is incurred by the neglect of this precaution.[2] In like manner, if two or more Mussulmans, or persons subject to Mussulmans, should enter into a foreign country without the permission of the Imam, and merely for the purpose of pillage, and should seize some of the property of the inhabitants, and secure it within the *Mooslim* territory, the property would be theirs.[3] The same principle seems equally applicable to the foreigners themselves, whose persons as well as property are *moobah*, as already mentioned.

Infidels conquered by infidels may be purchased as slaves by Mussulmans.

When Turks have subdued Room,[4] and have made captives of the inhabitants, or seized their effects, they become the proprietors of them; and if the Turks should be conquered by the Mussulmans, the latter may lawfully appropriate whatever of Room they may find in the possession of the former, even though there should have been a treaty of peace between the people of Room and the Mussulman community.[5] Or if a Mussulman should enter the Turkish territory under a safe conduct, he may lawfully purchase from the inhabitants the persons or property of the people of Room.[6] So, also, when a Mussulman enters a foreign country under protection, and purchases from one of the people his son, and brings him against his will within the *Mooslim* territory, he becomes his proprietor; though, according to the majority of doctors (whose opinion is held to be correct), he would not be so while they were still within the foreign territory.[7]

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[1] *Inayah*, p. 346. [2] *Hidayah*, vol. ii., p. 709.

[3] *Fut. Al.*, vol. ii., p. 307.

[4] Asia Minor, which was part of the Greek Empire in the time of the writer of this extract, the Turks being then unbelievers in the Mussulman religion.

[5] *Fut. Al.*, vol. ii., p. 320. [6] *Ibid.*

[7] *Jama-oor-Rumooz*, as cited in the P.P.M.L. Ap. p. 63.

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A child in respect of slavery follows the condition of its mother.

Legal qualities established in a woman pass from her to her offspring. Hence, the child of a free woman is free, and the child of a slave mother is in all cases a slave, except only when acknowledged by her master as his own offspring, which makes it free.[1]

Who are lawful slaves according to Moohummudan law.

From what has been stated, it may, I think, be inferred, that the following persons are recognized by the Moohummudan law as slaves:—First, persons who, being neither Mussulmans nor the subjects of any Mussulman state, have been captured in public or private warfare, or bought from their captors, or foreign and unbelieving parents, and brought against their own will and secured within the Mussulman territory. Secondly, the descendants, through females, of females so circumstanced.[2]

Cases in which the sale of a freeman by himself is said to be lawful.

In an extract from the Mooheet, cited in the 'Principles and Precedents of Moohummudan Law' (App. p. 65), it is stated that the sale of a freeman is unlawful, except when he is unable to pay property for which he is liable, or is nearly dead of hunger, and sees no means of preserving his life otherwise than by the sale of himself, or is reduced by famine to such an extremity that it is lawful for him to eat a dead body, but rather than do so he prefers to sell himself. From which it would seem that the sale of a freeman by himself in the excepted cases is lawful. A freeman, however, if a Mussulman, or subject to Mussul-

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[1] *Hidayah*, vol. ii., p. 464.

[2] According to the opinion given by the law officers in the case reported at p. 312 of the P.P.M.L., and apparently approved of by the learned author himself (Prin. i. p. 65), persons seized or obtained otherwise than in public warfare undertaken by orders of the Imam, are not legal slaves; and their opinion is confirmed by a subsequent decision of the S. D. A. of Calcutta (vol. v. p. 61). But the inference which I have ventured to draw from the original authorities agrees with the description of a slave given by Mr. Lane, who says expressly:—'A slave among Muslims is either a person taken captive in war, or carried off by force, and being at the time of capture an infidel, or the offspring of a female slave by another slave, or by any man who is not her owner, or by her owner, if he does not acknowledge himself to be the father; but the offspring of a male slave by a free woman is free.'—*Arabian Nights' Entertainment*, vol. i., p. 62, *note*.

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mans, is not *moobah* under any circumstances; and it is not certain that the author of the Mooheet had any such in his view. It is also worthy of remark that, though it has been by no means an uncommon practice in India for parents in a famine to sell their children to save them from starving, this extract from the Mooheet does not appear to have been introduced by the compilers of the Futawa Alumgeeree into that digest. There is no doubt, however, that a freeman may let himself to hire, and that the hiring may be effected by the word sale when a time is limited.[1] But it has been said that he cannot hire himself for any great length of time, such as seventy years, as that would be a mere pretext; and whatever the term may be, it would be cancelled by the death of either party.[2]

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[1] *Fut. Al.*, vol. iv., p. 574.

[2] *Inayah*, vol. iv., p. 91.

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CHAPTER II.

OF THE GENERAL CONDITION OF SLAVES, AND OF SLAVES AS INHIBITED AND LICENSED.

Condition of a slave with respect to his master.

A SLAVE is the property of his master, and is therefore a fit subject for inheritance and all kinds of lawful contracts. He is also subject to his master's power; insomuch that if a master should kill his slave he is not liable to retaliation.[1] With female slaves a master has the *milk-i-mootât*, or right of enjoyment, as already frequently observed; and his children by them, when acknowledged, have the same rights and privileges as his children by his wives.

His general disabilities.

A slave's power over himself is necessarily suspended while he is subject to that of another. He is accordingly incompetent to anything that implies the exercise of authority over others. Hence, a slave cannot be a witness,[2] or a judge,[3] or an executor or guardian to any but his master and his children;[4] neither can he inherit from anyone,[5] and a bequest to him is a bequest to his master.[6]

Inhibited and licensed slaves.

A slave is inhibited or prevented from engaging in any manner of business, lest he should impair his master's rights over him; but the inhibition can be removed by a licence. A slave who is not licensed is termed *muhjoor*, from *hujr*, inhibition. A slave who is licensed is termed *mazoon*, from *izn*, permission. *Izn*, as described in law,[7]

Licence described.

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[1] *Hidayah*, vol. iv., p. 282.
[2] *Hedaya*, vol. ii., p. 683.
[3] *Ibid.*, p. 612.
[4] *Fut. Al.*, vol. vi., p. 212.
[5] *Sirajiyyah*, p. 13.
[6] *Kifayah*, vol. iv., p. 1466.
[7] The authorities for the remainder of this chapter will be found in the *Book of Mazoon*, *Fut. Al.*, vol. iv.

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is a remission or abatement of right, without any limitation in respect of time, place, or kind of business. It is constituted by the master saying to his slave, 'I have licensed thee to trade.' Though the licence be for a day, or a month, it continues until the slave is again inhibited. As it is established by express words, so also it may be inferred from the master's conduct. Thus, when a master has seen his slave buying or selling, and has remained silent, the slave becomes licensed generally, though the particular act of disposal requires a special sanction in words to render it lawful; and it is only for what may take place subsequently that the slave is licensed. Though the licence were for one particular kind of business to the exclusion of all others, the slave would still be licensed for all; and it makes no difference whether the master expressly forbids all others, or is merely silent with regard to them.

What a licensed slave may and may not do.

A licensed slave may buy or sell, even at a great inadequacy of price, according to Aboo Huneefa; but the two disciples held that if the inadequacy be very glaring, the sale is not lawful. The slave may also appoint an agent for purchase or sale, and give and accept a pledge. So also he may take land in lease, or give or hold it in *moozaraût*,[1] and give and take property in *moozarubut*.[2] But he cannot marry without the permission of his master, nor give a slave in marriage, nor make a gift, nor bestow a *dirhem* in charity, though he may do so with *fooloos*, or even silver under the value of a *dirhem*. He may, however, acknowledge a business debt, and his acknowledgment is valid, whether assented to or denied by his master. He may also be sued for matters relating to trade or business, and testimony may be received against him without requiring the presence of his master.

Debts of a licensed slave are of different kinds.

The debts which a licensed slave may contract are of three kinds: First, debts that attach to his person, without any difference of opinion, and these are debts incurred by

[1] Literally, mutual sowing. A contract between the proprietor of land and a cultivator, by which they agree to divide the produce in certain proportions.

[2] See note, p. 161.

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the destruction of property. Second, debts which, by general agreement, do not attach to his person, such as the *ookr* for consummation of a marriage entered into without his master's permission. Third, debts with regard to which there is some difference of opinion; and these are debts contracted in the usual course of business and dealing.

Debts for which he may be sold;

When creditors bring a licensed slave before the judge on account of debts contracted in the course of trade and business, and the master is present, the slave may be sold if his gains and available property are not sufficient for their payment; but he cannot be sold in his master's absence. When a judge has sold a slave in the presence of his master, the proceeds are to be divided among his creditors, and if there be any surplus it is to be paid to the master. If the proceeds are insufficient to pay all the debts, the creditors are to be paid rateably as far as the proceeds will go. For the difference they have no remedy unless the slave be emancipated, when they can proceed against him; but they have no recourse against his master, even though he should become the purchaser of the slave.

and which attach to his gains and acquisitions.

The debts contracted in business by a licensed slave attach to his gains and acquisitions by gift or alms, whether acquired before or after the debts were contracted. But the debts do not attach to the capital stock given to him by his master to begin business with, if the articles comprising it can be distinguished from the other property in his possession. Nor can his master be called upon to refund any part of the *zureeba* (or stipulated allowance which he was to have received out of the slave's gains) that may have actually been paid to him.

Question as to the master's right to his gains when he is in debt.

It was a question between Aboo Huneefa and his disciples whether the master of a licensed slave has a right to his gains when he is in debt. According to the former, he has no such right if the gains are wholly absorbed by the debts, but otherwise he has; while according to the disciples, the existence of debt does not prevent the master's right of property in the gains, though it prevents him from disposing of them when the fact of the slave's being in debt is established.

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How the licence is cancelled.

A licence may be cancelled by inhibition at any time. But the inhibition must be made known in the same way as the licence was made known. That is, if the licence was intimated generally in the market-place, the inhibition must be intimated in the same public manner; while if the licence were granted in the presence of one, two, or three persons, the inhibition may be imposed in their presence also. A licence is also cancelled by the death, or continued madness, or apostasy and flight to a foreign country of either master or slave.[1] So also by the sale of the slave; and if he is not in debt, inhibition takes place on the instant of the sale. But if he be in debt, it does not take effect till the purchaser has taken possession of the slave. When the licensed slave is a female, inhibition is incurred by her bearing a child to her master; who thereupon becomes responsible for her debts if there are any.

[1] *Doorr ool Mookhtar*, p. 685.

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CHAPTER III.

OF QUALIFIED SLAVERY.

How slavery may be qualified.

SLAVERY may be permanently modified in three different ways. 1st, by *Kitabut*, or an agreement for emancipation in lieu of a ransom; 2nd, by *Tudbeer*, or gratuitous emancipation, to take effect at the master's death; and 3rd, by *Isteelad*, which is a slave's bearing a child to her master; and it has the same effect of emancipating at his death. Slavery may thus be said to be of two kinds, absolute and qualified. The absolute slave is termed *kinn* and *rukeek*. The qualified slave is either a *mookatub*, a *moodubbur*, or an *oom-i-wulud*, terms corresponding to the modified conditions before mentioned. These conditions, however, affect the disabilities of slaves only in so far as the master is concerned. Hence the testimony of all slaves is alike inadmissible, whether they be absolute, *mookatub*, *moodubbur*, or *oom-i-wulud*.[1] So, also, they are all alike incapable of inheriting,[2] and of marrying without the consent of their masters;[3] while a bequest to them by any other than their own master is a bequest to him.[4] But a man may lawfully make a bequest to his own *mookatub*, *moodubbur*, or *oom-i-wulud*.[5]

Three kinds of qualified slaves.

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[1] *Fut. Al.*, vol. iii., p. 552.
[2] *Sirajiyyah*, p. 13
[3] *Ante*, p. 159.
[4] *Fut. Al.*, vol. vi., p. 140.
[5] *Ibid.*, p. 141.

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Section First.

Of Kitabut and the Mookatub.[1]

Definition.

Kitabut is a contract between a master and his slave, the object of which is to make the latter free immediately as to his hand (or powers of action), and eventually as to his person. Its pillars are declaration on the part of the master and acceptance on the part of the slave. It is the declaration that manifests the nature of the transaction, as a master's saying to his slave, 'I have entered into *kitabut* with thee for so much,' or, 'Thou art free for a thousand, which thou art to pay me by instalments, every month so much,' or words to the like effect. With regard to acceptance, it is the slave's saying, 'I have accepted,' or 'am content.'

Effects.

The effect of *kitabut* on the part of the slave is to take off the inhibition under which he labours, to establish the freedom of his hand (or power of action) immediately, so as to give the slave a peculiar right in his own person and acquisitions, and to establish against the master responsibility for any injuries which he may inflict on his person or property, with an eventual right to compel emancipation on payment of the ransom, while it forbids his sale in the meantime. On the side of the master it empowers him to demand the ransom when it is due, and re-affirms his right of property in the slave in the event of non-payment. But he has no right to the gains of the slave, nor to exact service from him; and if he should have connection with his *mookatubah* he is liable for the *ookr*, because she has acquired a peculiar right in her own person by the *kitabut*. He is also liable if he trespass against her or her child or property. With regard to marriage and *iddut* the same rules are applicable to her as to an absolute slave.

While a *dirhem* of the ransom remains unpaid the

[1] The selections, when not otherwise indicated, are from the *Book of Kitabut, Fut. Al.*, vol. v.

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mookatub is a slave,[1] but on full payment he becomes immediately free, as by the mere force of the contract,[2] though the master should not have said, 'If thou payest it thou art free,' or, in other words, should not have suspended the emancipation on the condition. And if a pledge were taken for the ransom and it should perish, the slave would become immediately free.[3]

On payment of the ransom the slave is free.

Kitabut is of two kinds, one limited to the person, and the other extending to person and property. Under the first, whatever may be in the possession of the slave before the *kitabut* belongs to his master, but his after gains are his own; and if there should be any surplus of them after payment of his ransom it must be delivered to himself. Under the second, whatever may be in the slave's possession at the time of the *kitabut* or may subsequently be acquired by him is his own, whether it be more or less than his ransom. By the slave's property is to be understood whatever may come to him by gain, trade, free gift, or charity; and if any dispute should arise between the master and his *mookatub* with respect to his gains, the preference is to be given to the word of the latter. When a *mookatub* is unable to complete his ransom, and relapses into a state of absolute slavery, all the property in his hands belongs to his master.

Two kinds of *kitabut*.

A *mookatub* is under the same restrictions as to buying and selling, marrying, and gratuitously disposing of property as a *mazoon*. Nor can he give his son, or daughter, or male slave in marriage, but he may his female slave, whether absolute or *mookatubah*, because there is some advantage in that, from the dower which he is entitled to.[4]

What a *mookatub* may and may not do.

When a *mookatub* has purchased his father or son they enter into the *kitabut* and are emancipated, or fall back into slavery with him, and he cannot sell them. The rule is the same with regard to any other relatives, between whom

The parent and child of a *mookatub* purchased by him enter into his *kitabut*.

[1] *Hidayah*, vol. iii., p. 759. [2] *Ibid.*, p. 760.

[3] Because the loss of the pledge is equivalent to payment of the debt.

[4] *Hidayah*, vol. iii., pp. 771-2.

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and himself there is the relation of paternity, of whom he may become the proprietor, as grandfathers and grandmothers and children's children.

But not his other relatives.

If a *mookatub* should purchase his brother, or sister, or other relative within the prohibited degrees (not being a lineal ascendant or descendant), as a paternal uncle and aunt, or the like, they would not on a favourable construction take part in his own *kitabut*, so that he might lawfully sell them, according to Aboo Huneefa; and all are agreed that if he should purchase a cousin (or uncle's son) he would not enter into the *kitabut*, yet if when he pays his ransom they are still his property they become emancipated without having to work out their freedom.

Nor his wife, unless purchased with his child by her.

When a *mookatub* has purchased his wife he may lawfully sell her unless she has borne a child to him. In that case, if he should become the proprietor of both the wife and the child, he cannot sell the wife, but if he should become possessed of the wife alone he is not prevented from selling her, according to Aboo Huneefa; and this is correct. When he has purchased both, the child enters into his *kitabut*, and the mother into that of the child; and if he should die neither mother nor child would be required to perform emancipatory labour, but both be free on paying up what was due of the ransom at the time of his death.

Conjugal intercourse between them is lawful;

When a *mookatub* has purchased his wife he may lawfully have conjugal intercourse with her, and the child, if any should be the fruit of the intercourse, would enter into the *kitabut* of the father, and the mother into that of the child. If then in these circumstances the father should die without paying up his ransom, the child would come into his place, and, on paying up the instalments, both he and his mother would be emancipated by the payment. If the child should die in the father's lifetime, and the *mookatub* himself should then die, the mother would be free if able to pay up the ransom at his death; if not she must return to slavery.

aalso between a *mooka-*

When a *mookatubah* has purchased her husband, the marriage is not cancelled, and he may lawfully have con-

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jugal intercourse with her, for she does not in truth become the proprietor of him by the purchase.

tubah and her purchased husband.

When a *mookatubah* has borne a child to her master, which he has acknowledged, the paternity of the child is established without the necessity of any assent on her part, for she is still a slave as to her person, and she becomes an *oom-i-wulud* to her master. She may, however, abide by her *kitabut*, and in that case is entitled to *ookr*. If her master should die, she becomes free by virtue of the *isteelad* (or bearing a child), and the ransom falls to the ground. While, if she should die leaving property, the ransom would be paid out of it, and the surplus pass as heritage to her child, by reason of the establishment of her freedom in the last moments of her life; and if she should not leave any property, the child would be free without any obligation to emancipatory labour. A man may lawfully enter into *kitabut* with his *oom-i-wulud*; but if he should die she would be free by virtue of the *isteelad*, the ransom falling to the ground; while if she should pay the ransom during his life, she would become free by virtue of the *kitabut*.

A *mookatubah* may become an *oom-i-wulud*.

and *vice versâ*.

A man may also enter into *kitabut* with his *moodubburah*; and if he should die leaving no other property besides her, she would have to work for two-thirds of her value, or pay the whole ransom of the *kitabut*; while if he should die leaving property, she would be entitled to her freedom to the extent of one-third of his property, without any necessity for emancipatory labour. So, also, a man may enter into *tudbeer* with his *mookatubah*, and she may either abide by the *kitabut*, or declare her inability. If she should adopt the latter alternative, and her master should die without leaving any other property besides her, she has an option, and may either work for two-thirds of her ransom under the *kitabut*, or two-thirds of her value under the *tudbeer*.

So also a *moodubburah*.

When a *mookatub* has failed to pay an instalment of his ransom, and it appears, after waiting for two or three days at the most, that he has no means, and the master presses for a decree of inability, the judge is to pronounce

On failure of an instalment of the ransom, the *kitabut*

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may be cancelled by the judge. But it is not cancelled by the master's death; nor by that of the slave when he has left enough to pay his ransom.

it and cancel the *kitabut*. It may also be cancelled by *Ikalah*, or a mutual dissolution, or by the slave alone without the consent of his master, whether the contract be invalid or valid. But is it cancelled by death? Not by the death of the master, according to general agreement; for if the slave be able to pay his ransom he can pay it to the heir and be emancipated, or otherwise fall back into slavery. Nor by that of the *mookatub* himself, according to 'our' sect, if he die leaving means sufficient for his ransom; but if he die without leaving sufficient means there is a cancellation by general agreement. The *kitabut* is not cancelled by the master's apostasy, for as it is not cancelled by his natural death, so neither is it by his civil death.

A child born in *kitabut* is allowed to work it out by its instalments.

When a *mookatub* has died without leaving property enough to pay his ransom, but is survived by a child born to him during his *kitabut*, the child is allowed to work out the *kitabut* of the parent according to its instalments. When he has done so, decree is pronounced for the father's emancipation as having taken place before his death, and the child is free; but if the *mookatub* be survived by a child purchased during his *kitabut*, the child may be called upon to pay up the ransom immediately, or be remanded back to slavery. When a *mookatubah* has borne one child and purchased another, and then died, the child born in the *kitabut* is allowed to work out the ransom by instalments, and whatever the purchased child may acquire his brother may seize and pay the ransom out of it, the surplus of his acquisitions, if any, being divisible equally among them both. The born child may also, under the directions of the judge, let out the purchased child to hire.

Difference as to a purchased child.

Application of *mookatub's* estate when he has died in debt.

When a *mookatub* has died, leaving a sufficiency of property for the payment of his ransom, but in debt, and having bequeathed legacies, being also survived by a son who is a free man, and by another who was born to him during his *kitabut* by a bondswoman,—the debts to strangers are to be paid first out of his estate, then any debts which he may owe to his master besides the ransom, next the ransom; and when all these have been discharged, he

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is to be declared free, and the surplus, if there be any of his estate, is to be divided among his heirs, without any regard to the legacies, which being gratuitous acts are void. But if the *mookatub* should die leaving a thousand, and a debt of as much to his master, besides the ransom, the latter is to be paid first on a favourable construction, though according to analogy preference should be given to the debt. When a *mookatub* has died in debt, having also committed trespasses, and being liable for the dower of a wife whom he has married with the permission of his master, commencement is to be made with the debt; after which what is due on account of the trespasses is to be paid, then the ransom, and last the dower. In like manner, if, instead of leaving property, he should have left children born to him during his *kitabut*, they are to work, as has been described, because leaving a child to pay, is like leaving property to pay.

Section Second.

Of Tudbeer[1] *and the Moodubbur.*

Tudbeer is the suspending of emancipation, or making it dependent, upon death;[2] and it is not susceptible of revocation.[3] It is of two kinds; *Mootluk*, or absolute, and *Mookuyyud*, or restricted. The former is emancipation suspended simply on the master's death, without any further addition; for which the appropriate expressions are either *sureeh* or plain, as 'Thou art a *moodubbur*,' or 'I have made thee a *moodubbur*,' or such as are employed for freeing and emancipating, as, 'Thou art free after my death,' or, 'I have emancipated thee after my death,' or, for a *yumeen* (or suspending on a condition), as 'If I die, then thou art free,' or 'When I die then thou art free,' or, 'If anything should happen to me,' or, 'When anything

Definition.

First kind of *tudbeer*.

[1] The selections are from chapter vi., *Book of Emancipation, Fut. Al.*, vol. ii., when not otherwise indicated.

[2] *Doorr ool Mookhtar*, p. 304. [3] *Ibid.*, p. 305.

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has happened to me.' The *tudbeer* may also be in the language of bequest, as by the master's saying, 'I have bequeathed thyself,' or 'thy person,' or 'thy neck to thee,' or any part that implies the whole body, or, 'I have bequeathed a third of my property to thee.' So, also, if he should bequeath to the slave a *suhum*, or share of his property, the slave would be emancipated at his death;[1] though bequest of a part of it would not have that effect.

Its effect.

The effect of the *Mootluk*, or absolute kind of *tudbeer*, is that the master cannot sell, or make a gift of, the slave, or marry him against his will, or dispose of him in charity, though he may emancipate or enter into *kitabut* with him. But if he should sell the slave, and the judge decree for the lawfulness of the sale, the decree would be operative, and a cancellation of the *tudbeer*; so that if the slave should at any time thereafter come by any means into his master's possession, and the master should then die, the slave would not be emancipated. The master may also require service of the slave, or let him out to hire; and if the slave be a female, the master may lawfully have sexual intercourse with her, and her dower, if she be married, belongs to him. He is also entitled to her gains, as well as those of the male slave. Upon the death of the master, the *moodubbur* is entitled to freedom out of a third of the master's property; but if his master have left no other property, the slave must work for two-thirds of his value; while if his debts absorb the whole of the property, the slave must work for the whole of his value.

Second kind of *tudbeer*.

Tudbeer Mookuyyud, or restricted *tudbeer*, is emancipation suspended on a particular kind of death, or on death with the addition of some condition; as when a master says to his slave, 'If I die of this disease,' or, 'If I die on this journey, then thou art free;' and so of any other death that may or may not happen in the manner described, or of any other condition annexed to death, that is suscep-

[1] *Suhum* is a technical expression, which indicates that the slave is made a sharer in his master's property at death, that is, one of his heirs.

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tible of happening or not happening. In all such cases the slave is a restricted *moodubbur*. So, also, the *tudbeer* is restricted when a man says to his slave, 'If I die at a year or twenty years hence;' but if a time be mentioned beyond the usual period of human life, as when he says, 'If I die at a hundred years, thou art free,' the *tudbeer* is absolute. The effect, if the death take place in the manner or with the condition described, is the same as in the case of the absolute *moodubbur*; but in the meantime the master retains his full power of disposal, by sale, gift, or otherwise, and consequently may require service of the *moodubbur* and let him to hire; and in the case of a female, may lawfully have connection with her.

Incidents of both kinds.

The child of an absolute *moodubburah* is a *moodubbur*; but the child of a restricted *moodubburah* does not follow the condition of its mother.[1] If a *moodubburah* should bear a child to her master, she would become his *oom-i-wulud*, and the *tudbeer* be cancelled; because the *tudbeer* would entitle her to freedom only to the extent of a third of his property, while the *isteelad* would entitle her to it to the extent of the whole.[2] The value of an absolute *moodubbur* is two-thirds of his value if he were a *kinn*, or absolute slave. The restricted *moodubbur* is valued as a *kinn*.[3]

Section Third.

Of Isteelad and the Oom-i-wulud.[4]

Definition, and how a female slave becomes an *oom-i-wulud* to her master.

Isteelad means literally to claim a child.[5] When a slave has borne a child to her master, she becomes his *oom-i-wulud*, or mother of a child, whether the child be alive or dead, or be a mere abortion; for if actually formed, though only in part, yet if acknowledged by the master, it is accounted the same as a perfect child, for the making of

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[1] *Doorr ool Mookhtar*, p. 305. [2] *Ibid.* [3] *Ibid.*, p. 306.

[4] The selections, when not otherwise indicated, are from chapter vii., *Book of Emancipation, Fut. Al.*, vol. ii.

[5] *Inayah*, vol. ii., p. 375.

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its mother an *oom-i-wulud*. But if there be no appearance of formation, as if it has come away in pieces, the mother does not become an *oom-i-wulud*. It is necessary, in all cases, that there should be an acknowledgment or claim of the child on the part of the master; for otherwise its descent from him, on which the *status* of its mother depends, is not established.[1] When the master dies, the *oom-i-wulud* is emancipated as out of the whole of his property, according to a tradition that the Prophet ordered the mothers of children to be emancipated; and that they should not be sold for debt, nor taken out of the third of the property.[2] Hence, their emancipation, like funeral expenses, takes precedence of debts and the rights of heirs.[3] Hence, also, the sale of an *oom-i-wulud* by her master, and every other disposal of her, such as gift or bequest, that is incompatible with her inherent right to freedom at his death, is unlawful. But what is not incompatible with such right, as letting her to hire, requiring service from her, and taking her gains, is not unlawful. If she should again bear a child, that is, after her master has once acknowledged a child borne by her, his paternity of the second is established without any fresh acknowledgment, because by the first acknowledgment he has set her apart for family purposes, and she has become his *firash*, or concubine.[4] But there is still this difference between her and a wife, that her offspring may be rejected by a simple denial, whereas that of a wife cannot be rejected except by *lián* or imprecation. If an *oom-i-wulud* should become perpetually forbidden to her master, by his father or son having had connection with her, and she should subsequently be delivered of a child at more than six months from the fact, the paternity of the child so borne by her, after the incurring of the illegality, is not established in her master, without a claim on his part. But such a claim removes the objection, for his right in her is not impaired.

Her condition.

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[1] *Hidayah*, vol. ii., p. 462. [2] *Ibid.*, p. 464. [3] *Ibid.*, p. 465.

[4] *Hidayah*, vol. ii., p. 463. The word means, literally, *bed*, but is applied metaphorically to a woman so set apart.

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Though a man may give his *oom-i-wulud* in marriage, he should not do so till after the purification of her womb by the return of her courses. If he should neglect this precaution, and she is delivered of a child within six months the child is his, and the marriage is rendered invalid. But if the birth does not take place till after six months from the marriage, the paternity is established in her husband. Yet if the master should claim the child as his, it would be emancipated by reason of his acknowledgment, without affecting the paternity of the husband. The child of a married *oom-i-wulud* by her husband is in the same condition as its mother. Her master can neither sell, nor give, nor pledge it, and at his death it is emancipated out of the whole of his property. He may, however, exact service from the child, and let it to hire for that purpose. But if the child be a female, he cannot lawfully have connection with her. All these effects follow, though the marriage should be invalid.

She may be given in marriage with certain precautions.

Condition of child by her husband.

When a man has married his female slave to his male slave, and she is delivered of a child, which is claimed by her master, the paternity of the child is established in the husband; but it is emancipated by the master's acknowledgment of its freedom involved in his claiming it as his own, and the mother becomes his *oom-i-wulud*, and is emancipated at his death. It is the same thing whether the death be the natural termination of life, or only a civil death through apostasy and joining the enemy. In like manner, when an alien living as a *moostamin*, or under protection in the Mooslim territory, has purchased a bondmaid, and got a child by her, and then returns to his own country, wishing to reduce her to absolute slavery, she is emancipated.

A female slave may be made *oom-i-wulud* to her master by his merely claiming her child.

When an *oom-i-wulud* is emancipated by the death of her master, whatever happens to be in her hands at the time is his property, unless in so far as it has been bequeathed to her by him.

The property of an *oom-i-wulud* belongs to her master.

When a man has had connection with the bondmaid of another, either by virtue of marriage, or under a semblance of right, and she is delivered of a child, and afterwards

A slave who has lawfully

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borne a child to a man, and is subsequently acquired by him, becomes his *oom-i-wulud.*

becomes his property, the paternity of the child is established in him, and she becomes his *oom-i-wulud*, from the date of her so becoming his property, but not as from the time of the original connection. If the child were the fruit of illicit intercourse, and the mother should subsequently become the man's property, she would not be his *oom-i-wulud* according to all 'our' doctors. The child, however, would be free, though the mother might be sold.

Acknowledgment by a man of the child of which a slave is pregnant makes her his *oom-i-wulud.*

A female slave being pregnant, her master acknowledges that her burden is from him;—she thereupon becomes his *oom-i-wulud.* In like manner, if he should say to her, 'If thou art pregnant it is by me,' and she should afterwards be delivered of a child within six months, she would become his *oom-i-wulud.* But if the delivery were not till after the expiration of six months or more, the acknowledgment of the child would not be obligatory on him, and the woman would not become his *oom-i-wulud.*

Circumstances which render it incumbent on a man to acknowledge the offspring of his female slave.

When a man has secluded his female slave, and has had intercourse with her without *izl*, and she is subsequently delivered of a child, he ought to acknowledge it; and as between himself and his conscience it is not lawful for him to sell the mother. But if he has not secluded her, or has practised *izl* in his intercourse with her, he may lawfully deny the child, according to Aboo Huneefa. If a man should say to a boy too old to be his son, 'This is my son,' the boy would be emancipated as against him, according to Aboo Huneefa; and the better opinion is that the mother also would become his *oom-i-wulud* by force of the acknowledgment.

A child of two or more fathers.

If a slave who is the property of two men should be delivered of a child which is claimed by one of them, its paternity from him is established, and the mother becomes his *oom-i-wulud.* If both should claim the child, his paternity would be established as from both; and he would take the full share of a son in the inheritance of each. Each of the partners also would take the full share of a father in the inheritance of the child. In like manner, if the woman should be the property of three, or four, or five persons, and they should all claim the child, its

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paternity would be established as from each of them, and the woman would become the *oom-i-wulud* of each, according to Aboo Huneefa. Though the shares in her of the different proprietors were unequal, that would not affect her right to be the *oom-i-wulud* of all. Each, however, would remain entitled to her service only in proportion to his share.

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CHAPTER IV.

OF SLAVERY IN BRITISH INDIA.

THE relation between master and slave has been greatly modified in the British territories in India by an Act of the Indian Legislature; which, as it is short, I insert at length, for the convenience of reference:

'*Act No. V. of* 1843.

'AN Act for declaring and amending the law regarding the condition of slavery within the territories of the East India Company.—

'I. It is hereby declared and enacted, that no public officer shall, in execution of any decree or order of court, or for the enforcement of any demand of rent or revenue, sell, or cause to be sold, any person, or the right to the compulsory labour or services of any person, on the ground that such person is in a state of slavery.

'II. And it is hereby declared and enacted, that no rights arising out of an alleged property in the person and services of another as a slave shall be enforced by any civil or criminal court, or magistrate, within the territories of the East India Company.

'III. And it is hereby declared and enacted, that no person who may have acquired property by his own industry, or by the exercise of any art, calling, or profession, or by inheritance, assessment, gift, or bequest, shall be dispossessed of such property, or prevented from taking possession thereof, on the ground that such person, or that the person from whom the property may have been derived, was a slave.

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'IV. And it is hereby enacted, that any act which would be a penal offence, if done to a free man, should be equally an offence if done to any person on the pretext of his being in a condition of slavery.'

Two questions of some importance arise on the application of this Act to Moohummudan slavery. First, Does it remove the impediment to inheritance? Second, Does it leave enough of slavery to establish the paternity of a child borne to a Moohummudan by his slave, and acknowledged by him?

The Act does not confer any new capacities on the slave, nor take away any that he possessed, except in so far as these effects may be produced by the removal of the disabilities under which he labours with regard to his master. But these disabilities are equally removed by the contract of *kitabut*. Yet the slave is not qualified by it to inherit,[1] nor does it prevent the paternity of a child borne by a *mookatubah* to her master from being established, if acknowledged by him.[2] The modification of slavery by the Act is very similar to its qualification by *kitabut*. I am, therefore, inclined to infer the same consequences from both; as it does not appear to have been the intention of the legislature to make any alteration in the condition of the slave, beyond what was necessary to protect him in person and property against the acts and interference of his master.

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[1] *Ante*, p. 371.

[2] *Ante*, p. 375.

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CHAPTER V.

OF EMANCIPATION.[1]

How emancipation is effected.

EMANCIPATION is effected verbally, or in writing, and by words that may either be plain, joined to plain, or ambiguous. The plain, or *sureeh*, are the words, 'Thou art free,' or 'emancipated,' or, 'I have freed' or 'emancipated thee,' or, 'O freed,' 'O emancipated;' being equally effective, whether used in the way of description, information, or address. The words that are said to be joined to plain, are such as, 'I have given,' or, 'sold thyself to thee.' The ambiguous, or *kinayát*, are such as, 'I have no property in thee.' But to give these expressions the effect of emancipation, it must be intended. Emancipation may also be effected in various other ways; as, for instance, by a claim of paternity, or by a slave's becoming the property of a relative within the prohibited degrees, or by an acknowledgment of freedom followed by the person in whose favour it has been made becoming the property of the acknowledger; or sometimes even by mere entrance into the *Dar-ool-Hurb*, or *Dar-ool-Islam*, as when a *Mooslim* slave is taken by an alien master into the former, or escapes from him and takes refuge in the latter.

Partial emancipation.

When a slave is partially emancipated, as, for instance, when a half, or third, or any other undivided share in him is emancipated, he has to work out the remainder of his freedom by emancipatory labour. His condition, in

[1] For the few selections in this chapter, see *Book of Emancipation*, chap. i., *Fut. Al.*, vol. ii.

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the meantime, is that of a *mookatub*, whether he were the property of one person, or of several persons. He has a right to his own acquisitions; and the remaining share in him cannot be sold, or otherwise transferred, even though the partial emancipation were by one partner, without the assent of the others. But in the latter case, the other has the option of requiring emancipatory labour for his share from the slave, or making the emancipatory owner responsible for its value.

Emancipation for property.

When a person has freed his slave for property, and the slave has accepted, he is emancipated on the instant, and the sum stipulated for becomes a debt against him. As for instance, if a person should say to his slave, 'Thou art free for a thousand *dirhems*.' If the party be present, acceptance must be made at the same meeting with the declaration; and if absent, then at the meeting where he receives information of the declaration. Where an emancipation is made dependent on the payment, as by the master's saying, 'If thou payest to me a thousand thou art free,' it takes effect on the payment, and there is no need for acceptance. In the meantime the slave is only a *mazoon*, not a *mookatub*, so that if he should die without paying, his property would belong to the master, and the ransom could not be paid out of it. The slave, also, if the master should die, would fall back into absolute slavery, and form with all his gains part of the master's estate. If a master should say to his slave, 'When thou payest to me a thousand, then thou art free,' its payment is not restricted to the meeting. But if he should say, 'If thou payest to me a thousand, then thou art free,' the payment is restricted. In both cases the slave is a *mazoon* until payment, and after it has been made he is free.

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CHAPTER VI.

OF WULA.[1]

Definition. WULA means literally, assistance and friendship.[2] In law it is defined to be a relation arising out of emancipation and *moowalát*.[3] It is thus of two kinds,—the *wula* of emancipation, also termed the *wula* of *niâmut*, or beneficence, and the *wula* of *moowalát*, or mutual friendship.

Of two kinds:

I. *Wula* of emancipation. The former is established by emancipation, however induced, and whether the emancipator be male or female, or both the parties be *mooslim* or infidels, or one be a *mooslim* and the other an infidel. Its effects are as follows:—1st. The emancipator inherits the property of the emancipated, and also of his children under certain conditions. If the emancipator have died, and then the emancipated, without leaving heirs of his blood, his succession belongs to the nearest male among the residuaries of the emancipator (for women have no *wula* except to those whom they actually emancipate)[4] subject to the payment of his debts and legacies.[5] 2nd. The emancipator is liable for the *akl*, or fine incurred by the emancipated in default of assistance and protection.[6] 3rd. The emancipator is the

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[1] Mr. Hamilton spells the word with a *kusrah* (*i*), but the Arabic dictionaries spell it with a *futha* (*u*).

[2] *Inayah*, vol. iii., p. 142. The selections, when not otherwise indicated, are from the book *Wula*, *Fut. Al.*, vol. v., p. 37 *et seq.*

[3] Derivative from *Wula*, signifying mutuality.

[4] *Doorr ool Mookhtar*, p. 675. [5] *Ibid.*

[6] That is, his share of the fine for manslaughter imposed on the *Akilah* of the manslayer. The *Akilah* are those enrolled with him in the same Dewan, or muster-roll; or if he is not enrolled, his family and kindred. *Ibid.*, p. 816.

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guardian in marriage of the emancipated. Of the conditions of inheritance, one is common to the emancipated and the child of emancipation, and it is, that the party has no residuary of his own. The other conditions are peculiar to the child of emancipation. Of these the most important is,—1st, that the mother of the child be emancipated, that is, neither free by origin, nor a slave; for if she be either, no one can have the *wula* of her child, whether the father be free or a slave. If both father and mother be emancipated, the child follows the mother in respect of *wula*, and his *wula* consequently belongs to her emancipator. 2nd. The child himself must not be emancipated; for otherwise his *wula* would belong to his own emancipator. The emancipator's right of inheritance both as to the cause of its establishment and conditions is in the nature of a residuary right. He is the last of the residuaries to the freed man or freed woman, coming in before the distant kindred, and even before the sharers as to any surplus that may remain after satisfying the sharers. So that, if the emancipated person has no heir, or none but distant kindred, the emancipator is entitled to the whole succession. If there are sharers, their shares are to be first deduced, and the surplus, if any, passes to the emancipator instead of reverting to them; while if there is no surplus, the emancipator has nothing. Upon these points the learned are all agreed. It is a further characteristic of this right, that it arises necessarily out of emancipation, and cannot be cancelled, even by the emancipator himself. So that if one were to emancipate a slave as a *sáibah*,[1] that is, making it an express condition that he should be a *sáibah*, and the emancipator have no right to his *wula*, the condition would be void, and there would be *wula* notwithstanding, according to all authorities.

II. *Wula* of mutual friendship.

The WULA of MOOWALÁT, or mutual friendship, is established by declaration and consent; as for instance, when a convert to *Islam* says to the person whose proselyte he

[1] The word means originally, one freely dismissed; technically, it is as described in the text.

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is, 'Thou art my *Mowla*, or master; thou shalt inherit to me and pay my fine when I commit an offence,' and the person so addressed says, 'I have accepted.' It is alike whether the person addressed be the party whose proselyte the convert is, or another; and upon this point all authorities are agreed. Among the conditions of this *wula*, it is required that there be a contract; and puberty on the part of the person making the declaration is essential, though on the part of the acceptor it is required only as a condition of operation. It is further required that the contractor have no heir, that is, no relative entitled to inherit from him; for if he have, the contract is not valid. It is valid, however, though he should be married; the husband or wife in that case taking his or her share, and the *Mowla* being entitled to the remainder. It is also necessary that the contractor should not be an emancipated person, and that no other should be liable for his fine. Inheritance and fine are thus among the conditions of the contract. And if both the parties should stipulate for inheritance, they would mutually inherit on both sides. It is not necessary that the one should be a proselyte of the other; but to give validity to the contract of *Moowalát* it is a condition that the contractor should be of unknown descent. But *Islam* is not a condition of this contract; for there may be *Moowalát* by a *Zimmee* to a *Zimmee*, or by a *Zimmee* to a *Mooslim*, or by a *Mooslim* to a *Zimmee*. Neither is it necessary that the parties should be of the male sex; for it is lawful by a man to a woman, or a woman to a man. So also with regard to the *Dar-ool-Islam*; insomuch that if an enemy should make a *Mooslim* his *Mowla* in the *Dar-ool-Hurb*, or the *Dar-ool-Islam*, there would be a valid *Moowalát*. The effect of the contract is that the right of inheritance is established by it at death, and that the fine should be paid for the proselyte when he commits an offence; also that, of his young children, those who are born after the contract enter into the *Moowalát*. This contract is lawful, without being imperative, unlike the other form of *Moowalát*.

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BOOK V.

OF PARENTAGE.[1]

CHAPTER I.

OF THE ESTABLISHMENT OF PARENTAGE.

Section First.

Of Maternity.

Maternity admits of positive proof; because the separation of a child from its mother can be seen.[2] And the testimony of one woman is sufficient to establish that fact. Descent from her is therefore established by mere birth.[3] For all that is required is identification of the child; and the Prophet himself accepted the testimony of the midwife to the birth of a child.[4]

Maternity admits of proof.

Section Second.

Of Paternity.

Paternity does not admit of positive proof, because the connection of a child with its father is secret. But it may be established by the word of the father himself, or by a

Paternity does not admit of proof,

[1] *Nusub.* The term is commonly restricted to the descent of a child from its father, but it is sometimes applied to descent from the mother, and is occasionally employed in a larger sense to embrace other relationships.

[2] *Inayah*, vol. iii., p. 588.

[3] *Jowhurrut-oon-Neyyerah*, Book of *Ikrar*.

[4] *Hidayah*, vol. iii., p. 549.

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but may be established, 1st. By marriage.

subsisting *firash*,[1] that is, a legally constituted relation between him and the mother of the child.

[2] There are three degrees in the establishment of paternity. The first is a valid marriage, or an invalid one that comes within the meaning of one that is valid. An invalid marriage that has been consummated is joined to valid ones in some of their effects, among which is the establishment of paternity.[3] The effect of this first degree is to establish paternity without a claim, and to prevent its rejection by a mere denial, though it may be rejected by *lián* or imprecation, in the case of a valid marriage, but not where the marriage is invalid; but if the case does not admit of *lián*, the paternity of the child cannot be rejected. The right of rejection continues only until the husband has expressly acknowledged the paternity of the child, or has made some manifestation of acquiescing in it, by the acceptance of congratulations, or the purchase of things necessary in connection with its birth, or a long time has elapsed with knowledge of the event, or until something has happened that cannot be undone, as, for instance, the commission of an offence by the child, and the imposition of a fine in consequence on the *âkilah* of the father. In fixing the length of time which precludes the father from denying the child, regard is to be had to custom; and if a time has elapsed after which it is not usual for a father to deny his child, the denial would not avail, according to Aboo Huneefa by one report, though by another he left it to the discretion of the judge; while Aboo Yoosuf and Moohummud fixed it at forty (days),[4] after which the denial would not be valid.

Conception must have taken

The shortest period of gestation in the human species is six months.[5] And if a man should marry a woman, and

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[1] *Hidayah*, *ibid.*

[2] The selections in the remainder of this section, where not otherwise indicated, are from the *Fut. Al.*, vol. iv., *Book of Claims*, chap. xiv., p. 153 *et seq.*

[3] *Hidayah* and *Kifayah*, vol. ii., p. 465; *Hedaya*, vol. i. pp. 482, 147.

[4] There is an omission in the original, but see *ante*, p. 342.

[5] *Sirajiyyah* and *Shureefeea*, p. 186.

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she is delivered of a child within six months from the day of marriage, the paternity of the child from him is not established, because conception must have taken place before the marriage; but if she is delivered at six months or more its paternity is established, because of the subsisting *firash*, or bed, and the completion of the term of pregnancy, whether he acknowledge the child or remain silent; and if he should deny its birth, that may be established by the testimony of one woman bearing witness to the fact. If the delivery be of twins, and one is born a day within the six months and the other a day beyond them, the paternity of neither is established.[1] If a dispute should arise between the husband and wife, he saying, 'I married thee since four months,' and she saying, 'since six months,' the word of the wife would be preferred, and the paternity of the child be established, because appearances testify in her favour, the birth being apparently in consequence of the marriage.[2] And if a man should commit *zina* with a woman, and she should become pregnant, and he should then marry her, and she be delivered of a child within six months of the marriage, its paternity from him would not be established unless he should claim it, and should not say, 'It is of *zina*;' but if he should say, 'It is mine by *zina*,' its paternity would not be established, neither would it inherit from him.[3]

place after the marriage.

The second degree in the establishment of paternity is the child's mother being an *oom-i-wulud* to her master; and the effect of her being so is that the paternity of her child is established from her master without any claim on his part, that is, if she were in such a condition that he might lawfully have had intercourse with her; but if that were not the case, as, for instance, if he had made her a

Paternity may be established, 2nd. By child's mother being an *oom-i-wulud*.

[1] *Hidayah*, vol. ii., p. 358, and *Fut. Al.*, vol. i., p. 723.

[2] *Ibid.*, p. 359.

[3] *Fut. Al.*, vol. i., p. 727. The claim is equivalent to acknowledgment (*Kifayah*, vol. iii., p. 550), which would, apparently, be sufficient of itself to establish the paternity under the circumstances mentioned. See *post*, p. 414.

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mookatubah, which would render his intercourse with her unlawful, the child's paternity would not be established from him without a claim on his part. The master of the *oom-i-wulud* may repudiate his child by a mere denial, unless a long time has elapsed with knowledge of its birth, or he has expressly declared it to be his, or done something that amounts to a waiver of denial, or something has happened that cannot be undone. If he should not deny the paternity until the child has died, it would then be too late to do so; and in like manner if the child should commit an offence, and a fine be imposed on the *âkilah* of the master, he would not have the power of denial. There is no doubt that if he should accept congratulations on the birth of the child of his *oom-i-wulud*, that would be an acknowledgment; and it is reported in some *Futawa*, that if he were merely to remain silent when congratulations are offered to him, that would amount to acceptance of them and an acknowledgment of the child. When a man has given his *oom-i-wulud* in marriage, and her husband dies or repudiates her, and she keeps *iddut*, and is subsequently delivered of a child at six months from its expiration, the child is her master's, though he is at liberty to deny it till one of the occurrences already mentioned. And though a man should render his *oom-i-wulud* unlawful to him, or have sworn not to approach her, still her child would be affiliated to him unless denied by him.

Paternity may be established, 3rd. By the child's mother being a mere slave; but not without claim by her master.

The third degree in the establishment of paternity is the child's mother being a mere slave; and the effect of her being so is that the descent of her child from her master is not established without a claim[1] on his part. But it makes no difference whether the claim be preferred after the birth of the child or while it is still in the womb, by saying, 'This burden, with which my slave is pregnant, is of me;' or, 'This child, which is in this person's womb, is of me.' When a mere slave has been delivered of a

[1] The claim, it will be remembered, is tantamount to an acknowledgment. See preceding page.

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child, and her master is congratulated and remains silent, that is not an acknowledgment of the child; though if he accept the congratulations, it is an acknowledgment. And when a man has secluded his slave, and has had connection with her, and she is delivered of a child, he ought to claim it, as the child is apparently his. Still, its descent from him is not established until he actually does so, that is, when he is not conscious of the fact that the child is his, while if he is conscious that the child is his, it is an incumbent duty on him to claim, and not to deny or repudiate it. If, however, he has not secluded the slave, he may deny her child.

Different kinds of claim.

The claim is of three kinds; a claim of *Isteelad*; a claim of *Tuhreer*; and a claim of *shoobhut-ool-milk*. The claim of *Isteelad* is when a man claims the descent of a child whose conception is known to have taken place while its mother was the property of the claimant, and it is valid whether she be his property at the time of the claim or not, while if the case admits of the descent of the child from the claimant, the claim is acknowledgment of connection with its mother, and cancels any contract such as sale, that may have taken place subsequent to its conception. The claim of *Tuhreer* is when a man claims the descent of a child who was not conceived while its mother was his property, and it is valid only when she is his property, while it is no acknowledgment of connection with the mother, nor a cancellation of contracts; but it induces emancipation whenever it can take effect. The claim of *shoobhut-ool-milk*, which means semblance of property, is when a man claims the child born by a slave of his son. When these claims are made at the same time the claim of *Isteelad* is preferred to that of *Tuhreer*, and the claim of *Tuhreer* is preferred to that of semblance of property.[1]

[1] The last paragraph is from *Fut. Al.*, vol. iv., p. 155. For further details as to the paternity of the child of an *oom-i-wulud*, or mere slave, see *ante*, book iv., sect. *Isteelad*, p. 379.

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Section Third.[1]

Paternity of a Child born after the relation between its Parents has ceased.

Period of gestation.

The shortest period of gestation in the human species is six months, as already observed, and the longest is two years, according to Aboo Huneefa, who assigned this as the *maximum* on the authority of Ayeshah, who is reported to have said, as having received it from the Prophet himself, that 'a child remains no longer than two years in the womb of its mother, even so much as the turn of a wheel.'[2]

General principle regarding it.

When a man has married a woman and she is delivered of a child at less than six months from the day of marriage, its descent from him is not established; but if she is delivered at six months or more its descent from him is established, whether he acknowledge it or remain silent, and if he should reject the paternity it would be established by the testimony of one woman to the fact of its birth. The principle in this case is that with regard to every woman on whom it is not incumbent to observe an *iddut*, the descent of her child from her husband is not established unless it be known for certain that it was begotten by him—by its being born within six months; and with regard to every woman on whom it is incumbent to observe an *iddut*, that the descent of her child from her husband is established, unless it be known for certain that the child was not begotten by him—by reason of its being born at more than two years. Keeping this principle in view, if a man should repudiate his wife before consummation, and she should then be delivered of a child within six months from the time of repudiation, its descent from him would be established, while if the delivery should take place at six months or more, its descent from him would not be

Application to a *moot-tuddah* for repudiation:

[1] When not otherwise indicated, the selections are from the *Fut. Al.*, vol. i., book *Tulák*, chap. xv., p. 722 *et seq.*

[2] *Shureefeea*, p. 187.

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established; and if a man should say to a strange woman, 'When I marry thee, then thou art repudiated,' and should afterwards marry her, the repudiation would take place, and if she were delivered of a child at the full completion of six months from the time of marriage,[1] its descent would be established;[2] while if the delivery were within six months from the marriage, the child's descent would not be established;[3] and if the delivery were at more than six months, the paternity in like manner would not be established, because of there being no *iddut*, and of the possibility of impregnation by another husband after the repudiation. When, again, the woman is not repudiated till after consummation, and she is subsequently delivered of a child, its descent is established up to two years. If the birth should take place at more than two years, and the repudiation were revocable, the child's descent would still be established and the repudiation held to have been revoked. And even though the repudiation had been irrevocable, still the descent of the child from the husband would be established if it were claimed by him.

—to a *moodtuddah* for death.

So far, when the woman is repudiated; but if the husband should die leaving her, whether before or after consummation (an *iddut* being required in both cases), and she is subsequently delivered of a child at any time up to two years, its descent is established from him, and if the delivery should not take place till after the expira-

[1] That is exactly; 'neither more nor less.' *Hidayah* and *Kifayah*, vol. ii., p. 353. In the English translation of the former we have 'after six months from the day of the marriage,' with a note that 'This means any time between six months and two years.' (*Hedaya*, vol. i., p. 376.)

[2] Because the repudiation being conditional on the marriage cannot take place till the condition is fulfilled, and the birth being at six months from the marriage, it must be less than that time from the repudiation. *Inayah*, vol. ii., p. 284. The case is thus brought under the rule, as the repudiation is supposed to take place without consummation or valid retirement, when no *iddut* is required.

[3] Because its birth is not sufficiently far from the marriage, or the conception must have taken place before it.

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tion of two years, its descent would not be established. In what has been said, it is implied that there has been no declaration by the woman of the completion of her *iddut*; for if she had made such a declaration at a time that the *iddut* may reasonably be supposed to have expired (whether it were for death or repudiation), and she were subsequently delivered of a child in less than six months from the date of the declaration, the paternity of the child would be established, but not otherwise.

When the *mooâtuddah* has married with another husband.

When a *mooâtuddah* has entered into a marriage with another man, and is delivered of a child at less than two years from the date of her repudiation, or the death of her first husband, and at less than six months from her marriage with the second, the child belongs to the first (because the second marriage is invalid).[1] But if the delivery is at more than two years from the repudiation or death, and at six months or more from the second marriage, that marriage is lawful, and the child belongs to the second husband. If, again, the birth is at more than two years from the first event, and at less than six months from the second, the child does not belong either to the first husband or to the second. The second marriage, notwithstanding, is lawful, according to Aboo Huneefa and Moohummud;[2] unless it were known at the time of the marriage that the woman was in her *iddut* when contracting. If that were known at the time, the second marriage would be invalid, and the paternity of the child be ascribed to the first husband, if that were possible, by its being born at less than two years from the death or repudiation, and at six months or more from the date of the second marriage, because, the second marriage being invalid, preference is given to the valid one, if possible. Where, again, it is impos-

[1] *Doorr ool Mookhtar*, p. 279; the delivery, in the circumstances, being evidence that the woman was pregnant, and therefore in her *iddut* at the time that she contracted the marriage.

[2] Because the birth of the child being at more than two years from the dissolution of the first marriage, it is evident that the woman was not pregnant, and therefore not in her *iddut*, at the time of the second.

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sible to ascribe the paternity to the first husband, while it may be ascribed to the second, by reason of the date of the first being more than two years from that of the death or repudiation, and at six months or more from the second marriage, the descent of the child from the second husband is established, because, though the second marriage is invalid,[1] there is an objection to the descent being ascribed to the valid marriage, and it is preferable to ascribe the pregnancy to an invalid marriage than to *zina*. When the master of an *oom-i-wulud* has died, or he has emancipated her, the descent of her child is established from him up to two years from the date of the death or emancipation.

Application of the rule to a slave who has been sold.

When a man has sold his female slave, and she is delivered of a child while in the possession of the purchaser, if the birth take place at less than six months from the sale, and the seller claims the child, or two witnesses give evidence to an acknowledgment by him, the child's descent is established from him, and its mother becomes his *oom-i-wulud*, while the sale is dissolved and the price must be restored to the purchaser. If the purchaser should claim the child, his claim would be valid, and the child's descent established from him,[2] the slave becoming his *oom-i-wulud*; and the purchaser's being a *tuhreer*, or emancipating claim,[3] he is entitled to the *wula* of the child. If both seller and purchaser should claim the child together, the claim of the former is to be preferred;[4] and if they claim one after the other, preference is given to the first claim, from whomsoever it may come. If the delivery should take place at six months or more, but between that and two years, from the time of sale, and the seller alone should claim the

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[1] It is assumed that the woman was known to be in *iddut* at the time of the marriage, which might be if she believed herself to be pregnant.

[2] The claim is equivalent to acknowledgment, which, as will be seen in the next chapter, is sufficient to establish the paternity of a child whose descent is not established from another.

[3] See *ante*, p. 395.

[4] Being a claim of *Isteelad*; *ibid.*

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child, his claim would not be established, unless assented to by the purchaser; and if the purchaser were to claim alone, his claim would be valid, but the claim would be one of *isteelad*, so as to make the child free by origin, and give the purchaser no right to *wula*. And if they should both claim together, or one after the other, the claim of the purchaser would be valid without that of the seller. If the delivery were more than two years after the sale, the claim of the seller would not be valid unless assented to by the purchaser; and if he should assent, the descent of the child would be established, but the sale would not be dissolved, nor the child's mother become the seller's *oom-i-wulud*, and the child would remain the property of the purchaser. And if the purchaser should claim it alone, his claim would be valid, and the claim one of affiliation, while if they both claim together, or one in succession to the other, the claim of the purchaser is valid.[1]

Section Fourth.[2]

Paternity of a Child begotten under a 'Shoobh,' or Semblance of Right.

Semblance in the fact.

It has been already remarked that there are three different kinds of *shoobh*, or semblance—semblance in the fact, semblance in the subject, and semblance in the contract.[3] Semblance in the fact comprises the following cases:—First, where a man has connection with a woman whom he has thrice repudiated, and who is still in her *iddut*. If the *iddut* had expired, there would be no semblance even of this kind; and all are agreed that the parties would be liable to the *hudd*, even though the husband had recalled his wife after the triple repudiation. An *oom-i-wulud* who has been emancipated, a *mookhtullah*

[1] The whole of the last paragraph is from the *Fut. Al.*, vol. iv., p. 156.

[2] The authorities, when not otherwise indicated, are from the *Fut. Al.*, vol. ii., book *Hoodood*, chap. iii., p. 208 *et seq.*

[3] *Ante*, p. 2.

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or woman released by *khoolâ*, and a woman who has been repudiated for property, are all during *iddut* in the same condition as the thrice repudiated woman; for connection with these is universally allowed to be unlawful. Second, where the woman is the slave of the man's father or mother, or grandfather or grandmother, or any more remote ancestor, or of his wife or master. When she is the slave of his brother or uncle, or of any other relative except a parent, or of any relative of his wife, there is no semblance whatever, and the man is liable to *hudd*, even though he should say that he thought the woman to be lawful to him. Third, where the woman is an impledged slave, and the pledgee has connection with her. With regard to this case, however, there are two reports, though by that which is approved the case is comprised under this kind of semblance. The pledger is in this respect on the same footing as the pledgee. But if a borrower, or one who has hired a slave for service, or received her in deposit, should have connection with the woman entrusted to him, he would be liable to the *hudd*, even though he should declare that he believed her to be lawful to him. With regard to all the cases comprised under this first kind of semblance, though there is no infliction of the *hudd* when the man claims that he thought the intercourse to be lawful, yet the paternity or descent of the offspring from him is not established, even though he should claim it.

Semblance in the subject.

Semblance of the second kind comprises the following cases:—First, when the connection is with a woman whom the man has completely repudiated by any of the *kinayát*, or ambiguous expressions.[1] Second, where the woman is the slave of the man's son[2] or his grandson, that is, his son's son, the father of the grandson being dead. Third, where she is a slave sold to the man, but not delivered to him, or is a *mumhoorah* (or female slave, given by him to his wife

[1] In this case there was a difference of opinion among the companions, Omar holding the repudiation to be reversible. *Hidayah*, vol. ii., p. 22.

[2] The semblance here is founded on a saying of the Prophet, 'Thou and thine are thy father's.' *Ibid.*, p. 23.

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in *muhr*, or dower) not yet delivered. Fourth, where she is the slave of his own *mookatub*, or *mazoon*, or a slave held by him in partnership with another. In all these cases, there is no infliction of the *hudd*, even though the man should not claim that he thought the intercourse to be lawful, and the paternity of the offspring is established if claimed by him.

Semblance in the contract.

The third kind of *shoobh*, or semblance, is that which is established by a contract of marriage; and, according to Aboo Huneefa, it is established whether the contract be lawful or unlawful, and whether all are agreed as to the illegality, or there is a difference of opinion on the subject, and whether the party be conscious of the illegality or not. But according to the other two, there is no semblance when the marriage is one which is universally allowed to be unlawful. The effect of this difference of opinion (between Aboo Huneefa and his disciples) appears when a man has intermarried with one of his *mooharim*.[1] As *mooharim*, so are the wife and *mooâtuddah* of another man; but if the marriage be one regarding which there is some difference of opinion, as a marriage without witnesses or without the consent of a guardian, there is no liability to the *hudd* by general agreement, by reason of the possibility of a semblance in all men's eyes; and in like manner, when one has married a slave or a free woman, or has married a *mujooseeah*, or a slave without the consent of her master, or a male slave has married without such consent, there is no *hudd* by general agreement.[2] In a collection of *Futawa*, it is stated that when an infidel has married a *Mooslimah*, and she has produced a child, its

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[1] *Inayah*, vol. ii., p. 462; and *Hidayah*, vol. ii., p. 588. For the effect, see *ante*, p. 150.

[2] The authority cited is the *Kafee*, and it would seem that, in the case of a marriage with the wife or *mooâtuddah* of another (who are said to be like *mooharim*), there would be no semblance of the contract, according to Aboo Yoosuf and Moohummud, and that, consequently, in their opinion, the paternity of the issue would not be established, except in a case of *ghuroor*, as hereafter mentioned.

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descent from him is not established, because the marriage is void. But Almighty God is most knowing.[1]

Section Fifth.[2]

Paternity of a Child begotten under 'Ghuroor,' or Deception.

Ghuroor described.

When a man has purchased a female slave, whether by a lawful or unlawful contract, or has become possessed of her by gift, or in alms, or by will, and she has borne him children, after which another has established a right to her, the slave is adjudged to the person so establishing the right to her, together with her children, unless *ghuroor*, or deception, of the person who begot them is established; and for that purpose it is necessary for him to prove the purchase, gift, or the like. If he should do so, the *ghuroor* would be established, and judgment be given for the slave with her *ookr*, and the value of the child or children, as of the day of contest; while, if any of the children should die before the contest, there would be no liability for the value of the child. A female slave comes to a man, and tells him that she is free, whereupon he marries her, and she bears him a child, after which the master establishes by proof that she is his slave, and she is accordingly decreed to him; but decree is to be given for the child also in favour of the master of the slave, unless the husband can adduce proof that he married her on the condition of her being free. If he can do so, a cause of freedom is established in favour of the child, which is the *ghuroor*, or deception, of his father; and the child being free, no power can be exercised over him, but his value is a debt against the father's property payable immediately at the time of the decree. A person to whom a woman, that

[1] *Doorr ool Mookhtar*, p. 279. As I have found this extract in a work of recognized authority, I do not think it would be right to withhold it, though the compiler of the collection is not mentioned, and the author who cites it seems himself to doubt its correctness.

[2] *Fut. Al.*, vol. iv., *Book of Claims*, chap. xvi., p. 201 *et seq.*

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is not his wife, is brought, on the night of the marriage, and who is informed by the woman in attendance that she has been married to him, and has intercourse with her in consequence, is not liable to the *hudd* (though he must pay the woman her dower); because a man has no means of distinguishing between his wife and another woman, on the first occasion of their meeting, except by the information of others, and the information of one person is sufficient in spiritual and temporal matters. If the woman so brought to him should be delivered of a child, though the slanderer of the man would not be liable to the *hudd* for scandal, yet the descent of the child from him would be established, and an *iddut* be incumbent on the woman.[1] This is properly a case of *shoobh* of the first kind, or semblance of assumption, or in the fact, as there is neither property nor the semblance of it, but the information is taken as establishing the right, in order to avoid the injury from the *ghuroor*.[2] But if a man having a wife should find a woman on his bed, in a dark night, and have connection with her, and say 'I supposed her to be my wife,' it has been said that his word would not be believed, and that he would be liable to the *hudd*; and according to Aboo Huneefa, a blind man would be subject to the *hudd* in the like circumstances. If, however, a blind man should call his wife to him, and a stranger should answer, saying, 'I am thy wife, and am such an one,' mentioning the name of his wife, and he should have connection with her, he would not be liable to the *hudd*; because *ikhbar*, or giving information, is legal evidence;[3] while if she were to answer only by some action, or by a mere 'Yes,' he would be liable to the *hudd*. A man legalizes his slave to another, who has connection with her in consequence, —he is not liable to the *hudd*.[4]

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[1] *Fut. Al.*, vol. ii., p. 213, and *Hidayah*, vol. ii., p. 591.

[2] *Kifayah*, vol. ii., p. 591. [3] *Hidayah*, p. 592.

[4] Nothing has been said of the offspring in these cases; but, *primâ facie*, where there is no *hudd* there is no *zina*, and consequently no bar to the establishment of paternity.

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Case of woman marrying on information of her husband's death.

When a trustworthy person has informed a woman that her absent husband is dead, or that he has repudiated her three times, or a letter of *tulák* (or repudiation) has come to her from him by the hands of a trustworthy person, and she has a strong conviction of its truth, she need be under no apprehension in keeping *iddut* and marrying another man. In like manner, if a woman should say to a man, 'My husband has repudiated me, and my *iddut* is past,' he need be under no apprehension in marrying her; and if she should be delivered of a child at more than six months from the marriage, the paternity is established.[1] But if a man should purchase a female slave, knowing that the seller had usurped her, or should marry a woman who has told him that she is free, knowing that she is a liar, and she should bear a child to him, the child would be a slave.[2] If he should purchase her, knowing that she is the property of another than the seller, but on the seller's assurance that her owner had appointed him his agent to sell her, or had died appointing him his executor, and that he was selling her in consequence, and the purchaser should then have a child by her, and the owner should make his appearance and deny the appointment of agency, the purchaser would have to restore the slave and pay the value of the child, and might then have recourse against the seller for the price of the slave, together with the value of the child, for which he had rendered him liable.[3]

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[1] *Doorr ool Mookhtar*, p. 274.

[2] That is, the paternity of the child would not be established.

[3] The child's paternity being established.

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CHAPTER II.

OF ACKNOWLEDGMENT OF PARENTAGE.

SECTION FIRST.

Of Acknowledgment in general.[1]

Definition of *ikrar*, or acknowledgment.

IKRAR, the Arabic word which is here translated 'acknowledgment,' means literally to confirm or establish;[2] but in law it is defined to be 'the giving of information for the establishment of a right in favour of another against oneself.' It is constituted by saying, 'So much is due by me to such an one,' or by words of the like import. Its conditions are understanding and puberty without any difference of opinion; but as to freedom, it is a condition only with regard to some things, and is not a condition as to others. So that if an inhibited slave were to make an acknowledgment of property, it would not be operative against his master; while if he were to acknowledge what would induce retaliation, it would be valid against himself. So also it is a condition that the acknowledgment be voluntary: insomuch that if made under compulsion it is not valid. The effect of acknowledgment is to make manifest the thing acknowledged, not to establish it from the beginning. Hence 'we' say that an acknowledgment of wine in favour of a *Mooslim* is valid, though if it were a transfer to him it would not be so; and in like manner, though

Its constitution.

Conditions.

Effect.

[1] Chap. i., book *Ikrar*, *Fut. Al.*, vol. iv., p. 213.

[2] *Doorr ool Mookhtar*, p. 594.

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a compulsory repudiation or emancipation is valid, a compulsory acknowledgment of them is not so. Further, if one should make an acknowledgment of property in favour of another, and the other should know the acknowledgment to be false, it would not be lawful for him, as between him and his conscience, to avail himself of the acknowledgment, unless the other should voluntarily deliver the subject of it to him, when the delivery would constitute a gift *ab initio*. *Ikrar* is to be regarded as declaratory with respect to right in the matter acknowledged; so that the right takes effect in favour of the person to whom the acknowledgment is made on the mere *ikrar*, and is not dependent on his assent. But in respect of rejection, it is to be regarded as a transfer from the beginning, like gift; insomuch that it is cancelled by rejection on the part of the person to whom it has been made, unless he had once assented, or the consequence would be the cancellation of a right belonging to another; in which cases the rejection would not take effect.

Section Second.[1]

What Acknowledgments of Relationship are valid.

Acknowledgment by a man is valid for five persons.

The acknowledgment of a man is valid with regard to five persons — his father, mother, child, wife, and *mowla*; because in all these cases he acknowledges an obligation;[2] but it is not valid except for these.[3] The acknowledgment of a woman is valid with regard to four persons—her father, mother, husband, and *mowla*. But it is not valid with regard to a child, unless assented to by her husband, for it is burdening him with the paternity.[4] All that has been said is subject to this qualification, that the acknowledger is not suing for property. When

—of a woman for four.

Qualification.

[1] Chap. xvii., book *Ikrar*, *Fut. Al.*, vol. iv., p. 286.
[2] Namely, of maintenance: see *post*, Book vi.
[3] *Hidayah*, vol. iii., p. 581. [4] *Ibid.*

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property is sued for on the ground of the relationship, as, for instance, when a woman sues a man on the ground of his having married her for such a dower and then repudiated her before consummation, and thereupon claims half her dower; or a woman sues a man for maintenance, declaring herself to be his wife, the judge (it is generally agreed) is to put her on her oath.[1]

When the acknowledgment by a man of his child is valid.

The acknowledgment by a man of a child is valid under the following circumstances:—1st. The ages of the parties must admit of the party acknowledged being born to the acknowledger; as otherwise he would be manifestly a liar.[2] 2nd. The descent of the person acknowledged must not be already established from another; for if it were so that would prevent its establishment from any other but him.[3] 3rd. He must confirm the acknowledger in his acknowledgment if he can give an account of himself; for one who can do so is in his own power—contrary to the case of a child who cannot account for himself.[4]

When of his parents.

The acknowledgment by a man of his parent is in like manner valid when the acknowledger might be born to a person of the same age, and has no established descent from another, and the person acknowledged confirms the acknowledger in his statement when in a condition to do so.

When of his wife.

The acknowledgment by a man of a woman as his wife is valid when confirmed by her, and she is not married to another husband nor in *iddut*, and the acknowledger has not already her sister or four others in subjection to him.

When of his *mowla*.

And the acknowledgment by a man of his *mowla* of emancipation[5] is valid by his declaring that 'This slave is my freedman,' or 'This is my emancipator,' when the person to whom the

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[1] That is, the mere acknowledgment which is involved in the claim is not sufficient to establish the relationship.

[2] *Inayah*, vol. iii., p. 614. This condition, as usually expressed, is that the child is *mujhool-oon-nusub*, or of unknown paternity—that is, at the place of his birth, or place where he is residing.—*Doorr ool Mookhtar*, p. 604.

[3] *Ibid.* [4] *Ibid.*

[5] *Ibid.* The term is applicable to both the emancipator and the emancipated.

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acknowledgment is made confirms it, and the *wula* is not already established in another. Acknowledgment is valid with respect to all these persons whether it is made in health or in sickness, because it is of a matter binding on the acknowledger himself, and the burden of the descent is not cast on any other.[1] The acknowledgment of a man is not valid with respect to any other persons than those before mentioned, such as a brother, or a paternal or maternal uncle, or the like. But where it is valid, it is obligatory not only on the acknowledger and the person acknowledged, but on other persons also. So that if one were to acknowledge a son, for instance, the person acknowledged would inherit together with all the other heirs of the acknowledger, though they should all deny his descent, and he would inherit also from the father of the acknowledger, that is the grandfather of the person acknowledged, though the grandfather should deny his descent. And when it has been said that the acknowledgment of a man is not valid with respect to those above mentioned, it is only meant that it is not obligatory on any other except the acknowledger and acknowledged; but with regard to such rights as affect them only, the acknowledgment is valid. So that if one were to acknowledge a brother, for instance, having other heirs beside, who deny the brothership, and the acknowledger should die, the brother would not inherit with the other heirs, nor would he inherit from the acknowledger's father if he deny the descent, but he would be entitled to maintenance as against the acknowledger himself during his life. And if the acknowledger left no heir, the person acknowledged would be entitled to his succession, because the acknowledgment comprehends two things - descent, and a right to the acknowledger's property after his death, and though the first cannot be heard as it affects another party, the second is not liable to the same objection, because it is only against himself, and a man has the power of disposing of the whole of his

Where valid, it affects others besides the acknowledger and acknowledged.

[1] *Inayah*, vol. iii., p. 616; *Jowhurrut-oon-Neyyerah*, book of *Ikrar*.

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property when he has no creditor nor heir.[1] And if a person whose father is dead should acknowledge another as his brother, though the descent would not be established by reason of what has been said, yet the person acknowledged would be entitled to share with him the father's inheritance.[2]

Acknowledgment by a woman.

The acknowledgment by a woman is valid for three, that is, a parent, a husband, and a *mowla*, because it affects herself only; but it is not valid for a child. Some of 'our' sheikhs, however, have been of opinion that what is said about the invalidity of a woman's acknowledgment of a child is to be understood only of a married woman, for that when a woman has no known husband, her acknowledgment of a child ought to be valid. A woman who claims or acknowledges a child may be in one of three states—she may be married, or a *mooâtuddah*, or neither married nor a *mooâtuddah*. If she is married, and her husband confirms her in what she has said about the child being hers, its descent is established from both, and their is no necessity for any proof; but if he deny what she has said, she is not to be believed without proof, because she is burdening another with the descent. The testimony of the midwife, however, is sufficient for this purpose, because all that is required is to identify the child as hers, the ascription to the husband being an inference from the existing *firash* or bed. If she is a *mooâtuddah*, full proof is required, according to Aboo Huneefa, unless the pregnancy was manifest, or the husband had previously acknowledged it, though, in this case also, the two disciples were of opinion that the testimony of one woman is sufficient. If she is neither married nor a *mooâtuddah* it is said that the descent of the child is established by her word, because it is obligatory on none but herself, according to the approved opinion, though some maintain that, whether married or not, her assertion is not to be received without proof.[3] With regard to a woman's acknowledg-

[1] *Inayah*, vol. iii., p. 616.
[2] *Ibid.*
[3] *Inayah*, vol. iii., p. 588.

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ment of a parent, there is an apparent contradiction in saying that it is valid absolutely, for if it were valid with regard to a mother, being dependent on her confirmation, it would put her confirmation in the place of an acknowledgment of a child,[1] which is subject to some qualification, as above stated.

What difference of age is requisite when the parties are parent and child.

When the acknowledger of a child is a woman, she must be nine years and a half older than the child; and when a man, he must be twelve years and a half older than it, to render the acknowledgment valid.[2]

The assent of the person acknowledged, when requisite, may, in some instances, be given after the acknowledger's death.

In a case of parentage, confirmation by the person acknowledged is valid after the death of the acknowledger, because the relation continues after death. So also, assent or confirmation by a wife is valid after the death of the acknowledging husband, because the effect of the marriage continues after death till the expiration of the *iddut*. In like manner, assent or confirmation by a husband is valid after the death of his wife, according to Aboo Yoosuf and Moohummud, because of his right of inheritance, which is one of the effects of marriage; but according to Aboo Huneefa it is not valid, because the marriage itself is cut off by the death, and the assent cannot be founded on the right of inheritance, which was not in existence at the time of acknowledgment, to which the assent must necessarily be referred.[3]

Descent when established cannot be dissolved.

Descent, according to Aboo Huneefa, is one of those things which cannot be dissolved after it has been established; and declaration or acknowledgment (*ikrar*) is like it; insomuch that it is not reversed by rejection, but remains to the prevention of any claim, as if a person should testify against a man, as to the descent of a child from him, and should afterwards, on his testimony being rejected by reason of some suspicion, claim the child as his own. So also, if one having a boy in his possession should say, 'He is the son of my absent slave such an one,'

[1] *Jowhurrut-oon-Neyyerah*, book of *Ikrar*.

[2] *Jowhurrut-oon-Neyyerah*, book of *Ikrar*.

[3] *Hidayah* and *Kifayah*, vol. iii., p. 582; *Jowhurrut-oon-Neyyerah*, book *Ikrar*.

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and should afterwards say, 'He is my own son,' the boy could never be his son—not even according to Aboo Huneefa, though the slave should deny the boy to be his son. Upon this point his disciples differed from him, for they were of opinion that though descent does not admit of being dissolved, yet the declaration of it is reversed by rejection in the same way as if it had never been made. But it is only in the case of positive rejection by the slave that there was this difference of opinion; for if he should assent to the declaration of his master or merely remain silent, then the subsequent claim of the latter to the child as his own would not be valid, by general consent.[1]

Acknowledgment of marriage.

A man has acknowledged that he married such an one for a thousand *dirhems* (in health or in sickness makes no difference), and then denies the marriage, after which the woman assents, during his life or after his death; this is lawful, and she is entitled to her share in the inheritance, and also to the dower, with this difference, that if the acknowledgment were made in sickness and the dower be in excess of her proper dower, the acknowledgment is of no avail as to the excess. And if a woman should acknowledge in health or in sickness that she married such an one for so much, and then deny the marriage, after which the husband assents to it during her life, the marriage is established; but if he should not assent till after her death, it would not be established, according to Aboo Huneefa, nor the man entitled to any share in the inheritance, though, according to Aboo Yoosuf and Moohummud, it would be established. And if he should say to her, 'Did I not marry thee yesterday?' or 'Did I not divorce thee yesterday?' and she should answer, 'Yes,' that would be tantamount to an acknowledgment on her part; a question founded on a negative being equivalent to an affirmation, and the whole being thus as if he had said, 'I married thee,' or 'I divorced thee yesterday,' and she had answered 'Yes.' And if he should say to her, 'I married thee yesterday,' and she say, 'No,' but afterwards

[1] *Hidayah*, vol. iii., p. 347, and *Inayah*, vol. iii., p. 585.

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'Yes,' whereupon he says, 'No,' the marriage is obligatory on him. But if he should say, 'Did I repudiate thee yesterday?' this is an acknowledgment of marriage, and not of repudiation. A woman says to a man, 'Repudiate me,' this is an acknowledgment of marriage. So, also, if she say, 'Release me for a thousand *dirhems*,' or 'He repudiated me yesterday,' or 'released me yesterday, for a thousand *dirhems*.' If a man should say to a free woman, 'This is my son by thee,' or 'This is our son,' and she should answer, 'Yes,' it would be an acknowledgment of marriage; but not so if the woman were a slave.

Acknowledgment of a child is proof that the mother is the wife or *oom-i-wulud* of the acknowledger.

A man, having said to a boy, 'This is my son,' dies, after which the mother of the boy, being a free woman, comes and says, 'I am his wife:' she is his wife, and inherits from him. But it is reported in the Nuwadir that this is on a favourable construction of law, and only when the woman is known to be free; for if she be not known to be so, and the heirs allege that she was the *oom-i-wulud* of the deceased, while she maintains that she was his wife, she does not inherit.[1]

Effect of acknowledgment by a woman that she is a slave.

When a woman has acknowledged that she is the slave of such an one, and her condition in respect of slavery and freedom is unknown, her acknowledgment is valid, and she becomes his slave, so that he might do with her as he might do with a manifest slave. This would afford a precedent for the person in whose favour the acknowledgment is made taking the acknowledger for his slave, and requiring her services, and using her as his concubine, even though he should know that she has lied in her acknowledgment. But 'our' sheikhs have said that it is proper to distinguish, and that he can make use of her only when he knows that she has spoken the truth in her acknowledgment, and that when he knows she has spoken falsely it is not lawful for him to make use of her.

Marriage lawful with a

If a man should marry a woman of whom it is not known whether she be free or a slave, the marriage is law-

[1] *Fut. Al.*, vol. i., p. 727.

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woman of whom it is not known whether she be free or a slave.

ful on the ground of her apparent freedom; and if she should give birth to children and afterwards acknowledge herself to be the slave of another person, who confirms her statement, while the husband denies it, it is to be credited with respect to herself, so that she and all she has become the property of the person to whom the acknowledgment is made; but it is not to be credited with respect to her husband, so that the marriage is not cancelled for want of the master's permission; nor can he withhold her from her husband, but, on the contrary, the husband can prevent him from requiring her service.

Section Third.[1]

Of the Wulud-ooz-zina.

The descent of a *Wulud-ooz-zina* from its mother is established, but not from its father.

When a man has committed *zina* with a woman, and she is delivered of a son whom he claims, the descent of the son from the man is not established; but it is established from the woman by the birth.[2] In like manner, if a man should claim a boy, who is a slave and in the possession of another, as his son by *zina*, the boy's descent from him would not be established, whether the master of the boy should deny or assent to the claim; but if the man should subsequently, by any means, become the proprietor of the boy, the boy would be emancipated. The mother, however, would not become *oom-i-wulud* to the man, though he should afterwards acquire a right of property in her. The result would be the same if the claimant had said, 'This is my son by wickedness,' or 'I did wickedly with her and she gave birth to this child,' or 'This is my son by what is not right.' But if the claimant should say, 'He is my son,' without adding 'by *zina*'—the child having no other father—and should afterwards become his proprietor, the child's descent from the claimant would be established, and the child be free. And, in like manner,

[1] *Fut. Al.*, vol. iv., p. 173, *Book of Claims*, chap. xiv., sect. viii.
[2] *Bidayá*, and *Jowhurrut-oon-Neyyerah*, book *Ikrar*.

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if the man should say, 'He is my son by an invalid marriage' or 'invalid sale,' or should claim him under a *shoobh*, or semblance of right, his descent would not be established so long as he continues in the possession of another; but if the man himself should afterwards become the proprietor of the child, the child's descent from him would be established, and the child be free; and his mother also, if she should come into the man's possession, would become his *oom-i-wulud*.

Miscellaneous cases.

A man acknowledges that he committed *zina* with a free woman, and that this child is his by the *zina*, the woman assenting to the statement, the descent of the child is not established from either of them; but if the nurse should bear witness to the birth of the child, its descent would be established from the woman, though not from the man. And if a man should acknowledge to *zina* with a woman—it matters not whether she be free or a slave—and that this child is his son of the *zina*, and the woman should claim that there was marriage—valid or invalid, is of no consequence—the descent would not be established from the man, even if he should become the proprietor, but the child would be emancipated against him if he became proprietor of the child, and he would also be liable for the *ookr* (to its mother). So, also, if the woman should adduce one witness, the child's paternity from the man would not be established, even though the witness were a just person; but the man would be liable for the *ookr*, and the woman be subject in both cases to the observance of an *iddut*. If a man should claim a boy in the possession of a woman, saying, 'He is my son by *zina*,' while she insists that it is by marriage, the paternity is not established; but if he should subsequently say, 'By marriage,' the paternity would be established. In like manner, if he had sued 'by marriage,' and she 'by *zina*,' the paternity would not be established; but if she were subsequently to assent, it would be established. If the man should sue for the child on the ground of marriage, and she should claim it on the ground of *zina*, the child being in the hands of the man, its paternity would be established; but not so if the

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child were in the hands of the woman. Yet if the man should become possessed of the child, its paternity would be established and its mother becomes his *oom-i-wulud*, if he should afterwards happen to become her proprietor. He, however, would be liable for the *ookr*, and she be subject to an *iddut*. When a man has a wife who has borne a child on his bed, and the husband says, 'I committed *zina* with her, and this is the fruit,' and the wife assents, the paternity of the child is established.[1] When a woman has borne a child on her husband's bed, and the husband has said, 'Such an one committed *zina* with thee, and this child is the fruit,' and the woman has assented, and the person referred to has also acknowledged the fact, the paternity of the child is nevertheless established from the husband.[2]

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[1] It is implied that the birth is at six months or more after the marriage. See *ante*, p. 393.

[2] The paternity being established in both cases by the *firash*, cannot be repudiated except by *lián*. In the case of Fyaz Ali Khan, appellant, *v.* M. Fatima Khatoon, respondent (*Reports S. D. A.*, Calcutta, vol. i., p. 357), it was held that the daughter of a concubine, acknowledged to be his child by a man who had four wives living, was entitled to a share in his estate as one of his heirs. But the reporter remarks in a note—'It is to be presumed that the legal opinion in this case was induced by the fact (which was indeed deposed to by several of the witnesses) that the mother of the respondent was not only the concubine but the slave' of the acknowledger. It is further to be observed that the question was put to the law officer hypothetically, 'in the event of its being proved that the plaintiff is the daughter of Khoda Nowaz Khan, and that he had acknowledged himself the father,' and that the officer was merely asked, 'What share of the inheritance is the plaintiff, under the above circumstances, entitled to?' So that the decision as to the effect of the acknowledgment was only that of an English judge, and may have been given on the general principles of evidence, not those of Moohummudan law.

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CHAPTER III.

OF TESTIMONY TO PARENTAGE.

SECTION FIRST.[1]

Of Testimony in General.

TESTIMONY (*shuhadut*), as it is legally defined, is information given in truth and sincerity in a court of justice, in words of attestation, to establish a right. It is constituted by the word *ashudo* (I attest), without an oath. The reasons for giving it are either the requisition of a claimant, or an apprehension that he may lose his right when ignorant that there is a person who can bear witness to it. Its legal effect is to oblige the judge to decide according to its exigence.[2] If he refuses after the fulfilment of all its conditions, he sins by abandoning a positive duty, and deserves to be dismissed for his wickedness.[3] It is subject to two kinds of conditions; one having reference to the taking up of the testimony,[4] the other to the rendering of it.[5] Among the former are the following.

Definition.

Constitution.

Legal effect.

Conditions.

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[1] *Fut. Al.*, vol. iii., book *Shuhadut*, chap. i., p. 535.

[2] The authority cited for this important doctrine, which seems to give to testimony the weight of a verdict by a jury, is the *Inayah*. It is implied that all the conditions hereinafter mentioned are fulfilled.—Vol. iii., p. 387.

[3] *Doorr ool Mookhtar*, p. 544.

[4] Literally, *assuming its burden*.

[5] This distinction seems to have been in Mr. Bentham's view in the following passage from the treatise on Judicial Evidence, p. 88—'The word "witness" is employed to mark two different individuals,

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1st. Of taking up testimony.

The witness must have understanding and sight at the time of taking up his testimony, so that if he were a boy without understanding, or blind, at that time, his subsequent testimony to the fact would not be valid. And further, the testimony must be taken up on his own seeing and perception, not on that of another, except in some special cases, where he may take up his testimony on hearsay.[1] But it is not a condition that the witness be adult, free, a *Mooslim*, and just when taking up his testimony; so that if he were a boy of sufficient understanding, or a slave, or infidel, or wicked at that time, but should afterwards become adult and a *Mooslim*, or be emancipated, or repent of his wickedness, and then bear witness before the judge, his testimony would be accepted.

2nd. Rendering it.

Of the second kind of conditions, or those which have reference to the rendering or delivering the testimony in a court of justice, some relate to the witness, and these are, that he have understanding, puberty, freedom, sight and speech; that he has not undergone the *hudd* or specific punishment for scandal; and that he gives his testimony for the sake of God, drawing no spoil or advantage to himself, nor removing from him any debt or liability; that he is not a *khusum*, or adversary,[2] and is cognisant of the

That relate to the witness.

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or the same individual in two different situations: the one, that of a *perceiving* witness, that is, of one who has seen, or heard, or learned by his senses, the fact concerning which he can give information when examined; the other, that of a *deposing* witness, who states in a court of justice the information which he has acquired.

[1] *Tusoamoâ*, literally *listening*. Even in such cases it is necessary that the witness have his sight.—*Fut. Al.*, vol. iii., p. 551.

[2] The term is commonly applied to a litigant, but a person may be disqualified, as a *khusum*, from giving testimony in a cause to which he is not actually a party. Thus, an executor, after he has accepted office, is for ever disqualified from testifying in favour of a right due to his testator, even after he has been discharged by the judge and another has been appointed in his place, or after the heirs have attained to majority, and whether he has actually become an adversary or not, because he is like the deceased himself. So, also, a general agent for litigation is disqualified from testifying in favour of his principal to any right due at the time of the agent's appointment, or

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fact attested at the time of giving his testimony, remembering it, according to Aboo Huneefa, though that is not necessary according to the other two.[1] Justice in the witness is a condition necessary to make the acceptance of his testimony obligatory on the judge, not to its legality. So that if the judge should give his decree on the testimony of a wicked person, it would still be operative.[2] According to Aboo Huneefa, apparent justice is all that is required, and not real; neither is it necessary to be ascertained by inquiry and purgation; but, according to Aboo Yoosuf and Moohummud, these are conditions, and the *futwa* is in conformity with their opinion in 'these times.' The best description of what is justice in a witness is that which has come down from Aboo Yoosuf, and is that he be a person who refrains entirely from great offences, and does not persist in, or make practice of, such as are of less moment, and in whose character good predominates over evil, and his righteous deeds are more than his errors. There is some difference of opinion as to what are great offences, but the best description seems to be that of Hulwaee, who regarded them as such things as are odious and shocking to Mussulmans, comprising everything that is dishonouring to Almighty God and to religion, or contrary to humanity and good feeling. Among conditions of the second kind, there are also some that relate to the testimony itself; and these are, that it be required by the claimant or his representative in a standing suit,[3] and is

That relate to the testimony itself.

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that may accrue between that and his discharge, even after the agent has been discharged; but in that case the disqualification attaches only if the agent has once been made a *khusum*, or party to a suit on behalf of his principal.—*Fut. Al.*, vol. iii., p. 559.

[1] The difference of opinion refers, I think, to the case of a writing which has the signature of a witness, and to which the witness ought not, according to Aboo Huneefa, to testify, merely relying on the signature, without actual remembrance of the transaction. See *Hedaya*, vol. ii., p. 676.

[2] *Doorr ool Mookhtar*, p. 545.

[3] This is necessary in all matters relating to the rights of mankind, as distinguished from the rights of Almighty God.—*Kifayah*, vol. iii., p. 386.

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conformable to the claim;[1] that in matters spoken to by men, there are more than one witness, and that the witnesses agree in their testimony;[2] that in all cases where the person testified against is a *Mooslim*, the witness is also a *Mooslim*.[3] Further the subject of the testimony must be known; for if it be unknown the testimony cannot be received, since a judge cannot pass a decree with regard to what is unknown. Hence it is that when two persons bear witness that such an one is the heir of the deceased, and that there is no other heir besides him, their testimony cannot be received, because they testify of what is unknown, there being many different causes of heirship.

That relate to the subject of the testimony.

Divisions of testimony.

With regard to the divisions of testimony, there is, first, testimony to *zina*, as to which four men are necessary; then there are the other cases of *hudd*, to which two men are sufficient; but in none of these two divisions is the testimony of a woman admissible. Thirdly, there

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[1] The second part of the rule follows necessarily from the first, but agreement in meaning is all that is required; so that if a person should complain of an usurpation, and the witnesses should testify to the acknowledgment of an usurpation, their testimony would be accepted.—*Fut. Al.*, vol. iii., p. 585.

[2] The decree of a judge is lawful on *hoojjut*, or proof, which is the testimony of two witnesses; but if the witnesses do not agree in what they testify to, *hoojjut* is not established (*Kifayah*, vol. iii., p. 386). Here agreement in words, as well as meaning, is required, according to Aboo Huneefa, whose opinion is held to be correct. So that if one of the witnesses should testify to an usurpation, and the other to the acknowledgment of it, the testimony would not be accepted (*Fut. Al.*, vol ii., p. 595). But it is sufficient if the words be synonymous, as if one testifies to *nikah*, and the other to *tuzweej*, both words signifying marriage. (*Ibid.*) In all cases testimony to less than the claim is held to be agreement *pro tanto*, contrary to the case of testimony to more, and a claim or testimony to property absolutely is held to be more than a claim or testimony to it for a cause.—*Doorr ool Mookhtar*, p. 555.

[3] The testimony of *Zimmees* is accepted against each other, and against *Moostamins*, but not that of *Moostamins* against *Zimmees*, nor against other *Moostamins* of a different country. According to the more valid opinion, the testimony of an apostate is not to be accepted in any case. *Fut. Al.*, vol. iii., p. 611.

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are child-birth, and the puberty and blemishes of women, with regard to which men cannot give information; and in these cases the testimony of one woman who is a *Mooslim*, and just, is sufficient, though it is more cautious to have two. In all other matters (besides *hudd*, retaliation, and such as men cannot give information of,) the testimony of two men, or of one man and two women, is necessary; whether the right in question be one of property or not of property, as marriage, repudiation, emancipation, agency, bequests, and the like. What is necessary for the fulness of punishment, viz., *Ihsan*, belongs to this last division; so that it may be established by the testimony of one man and two women.

Section Second.

Of Taking up Testimony.

A person may refuse to take up testimony.

With regard to the taking up of testimony, there seems to be no objection to a person's declining to do so.

But to give testimony is a bounden duty; in so far that a man sins by refusing it, when he is called upon by a claimant, and knows that the judge will accept his testimony. There is an exception to this in matters involving *hudd* or specific punishment, with regard to which it is optional to a witness to conceal or declare what he knows, and concealment is preferable, except in the case of theft, where the witness should give his testimony so far as affects the property; but then he should say that the party took the property, not that he stole it.

Difference between what has legal effect in itself,

What a witness may take up his testimony to is of two kinds. One has legal effect in itself without calling on a person to attest it, such as sale, acknowledgment, the sentence of a judge, usurpation, and homicide. When, therefore, a man has heard a sale, acknowledgment, or sentence of a judge, or has seen an usurpation or a homicide, he may bear witness to them without having been invoked to

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and what has not.

that effect, and he should say, 'I bear witness that he sold,' not 'that he invoked me,' which would be untrue. The other kind is that which does not establish a legal effect of itself, as testimony to testimony; and when a person has heard another bear witness to anything, it is not lawful for him to bear witness to the attestation without having been called on to do so.[1]

When the witness hears from behind a screen.

If one should hear from behind a curtain, it is not competent to him to bear witness, because the voice may be that of another person, since one voice resembles another; but if a person be in a place alone, and the witness has gone in and ascertained that there is none other there, and then seated himself at the entrance (there being only one), and has heard the person from within make an acknowledgment, it is incumbent on the judge to receive his testimony when he has explained the circumstances.

When the testimony has reference to a veiled woman.

There is some difference of opinion as to taking up testimony to a veiled woman, some authorities insisting that it cannot be done without seeing her face; but others maintaining that it is valid when the woman has been described, and that description by one person is sufficient, though it would be more cautious to have two. 'We' all agree that it is lawful to look on the face of a woman for the purpose of taking up testimony with regard to her; and, according to Aboo Yoosuf and Moohummud, when two just

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[1] *Kafee* and *Hidayah*, vol. iii., p. 368. A sale has legal effect in itself, because the right of the purchaser in the thing sold, and of the seller in the price, is established by the mere contract; but testimony has no legal effect in itself, because its effect is not established of itself, but by the judge's decree. *Kifayah*, vol. iii., p. 368. 'Legal effect,' as here explained, must be carefully distinguished from the 'legal effect' which is referred to in the following extract from Mr. Bentham's treatise on Judicial Evidence (p. 10):—'A fact may have legal effect, that is, may serve as a proof either directly or indirectly.' Facts can hardly be said to have any legal effect in this sense in Moohummudan law, as the principal fact, that is, the fact to be proved, is attested directly by the witnesses. An instance of this is given in the text, and the reader will meet with more instances as he proceeds. Some further illustrations of 'legal effect,' which bring out its meaning more fully, will be found further on.

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persons inform the witness that she is such an one, it is sufficient, and the *futwa* is with their opinion; but when the two just persons have described her by her name and *nusub*, or lineage,[1] they ought to invoke the other witnesses to their testimony in the manner prescribed for that purpose,[2] so that the latter may bear witness before the judge to the testimony of the former to her name and lineage, when they give their own testimony to the original right; and then the whole will be lawful without any difference of opinion.

When two persons bear witness to a woman by name and lineage who is present, and acknowledge in answer to a question of the judge that they don't know her, their testimony is not to be received; but if they say, 'We took up our testimony to a woman whose name and lineage were so and so, but do not know whether this be she or not,' their testimony is valid as to the person named, and the claimant should be required to prove that this is the woman who has been described by her name and lineage. Witnesses may be received to identity whose testimony would not be good either for or against the woman, and though some exception has been taken as to the witnesses for her, yet Nujumooddeen Nusfee approves of the first opinion.

When a person has seen both proprietor and property, and knows the former by face and by name and lineage, and the latter with its rights and boundaries, and has seen it in his possession, and him using or disposing of it as a proprietor, and claiming it to be his, and the person believes in his heart that the property belongs to the party in question, he may lawfully testify to its being his property.[3] It is stated in the Moontuka, that 'when thou hast seen a thing or a mansion in the possession of a person, and believest in thy heart that it is his, and hast afterwards seen it in the possession of another, thou mayest

When a person has seen a thing in the possession of another he may attest it to be his property,

[1] Lineage. It is usual to include the grandfather's as well as the father's name in the description of a person.

[2] See *post*, section third.

[3] *Moheet*; and *Hidayah*, vol. iii., p. 371.

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unless credibly informed to the contrary.

bear testimony that it belongs to the first; but if, at the time that thou art minded to testify in favour of the first it is attested to thee by two just persons, that he in whose possession it is to-day had deposited it with the first in their presence, it is not competent to thee to testify that it belongs to the first; it would be different, however if the attestation were only by one person, unless thou believest in thy heart that this one witness is faithful and true.' No mention is made in the Jama Sugheer of 'belief in the heart,' and 'use or disposal,' combined with possession, but what is stated in the Moontuka is valid.[1]

But he ought not to explain the grounds of his testimony.

But the witness ought not to explain that his knowledge is derived from seeing the possession; for if he explain—that is, if he testify because he saw the thing in his possession—his testimony is to be rejected.[2] And the Kazee Imam says, that when one has seen a thing in the possession of a person who is making use of it, and men tell him that it is his property, but in his own belief it is the property of another by whose direction he is using it, the person who sees it cannot lawfully bear witness to its being the property of the possessor; and there are many *futwas* in accordance with this opinion. And if a person has seen a man sitting in the seat of judgment, and litigants going in to him, it is lawful for him to testify that the man is a judge—though he should not have seen the Imam's appointment of him—and so when a person has seen a man and woman dwelling in the same house (*beit*),[3] and behaving familiarly with each other in the manner of married persons,[4] it is lawful for him to testify that she is his

In like manner one may testify to marriage on sight of cohabitation.

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[1] Kazee Khan is the author cited, but the author of the *Hidayah* seems to be of a different opinion, with regard to use and disposal, though he admits that many of the Hanifite doctors concur with *Shafei* in requiring the sight of an act of disposal as well as of possession. See *Hedaya*, vol. ii., p. 680.

[2] Kafee. *Hidayah*, vol. iii., p. 370, and *Inayah*, vol. iii., p. 402, the parts between the marks — — being added from the latter.

[3] More properly, perhaps, apartment, sleeping-room, from *bata*—pernoctavit in nocte (*Freytag*).

[4] Arab, *Imbisat*, literally 'relaxing.'

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wife—in the same way as when he has seen a specific thing in the hands of another.[1]

A person may testify, on seeing his signature to a document as witness.

When a person sees his *khut*, or signature to a document,[2] without remembering the transaction, or remembers the writing of his signature as a witness, without recollecting the property, it is not competent to him to testify, but, according to Moohummud, it is competent to him to testify, and, says Hulwaee, decisions are given in conformity with his opinion. And in the Nuwazil, when a man knows his *khut*, and the *khut* has been in his own possession, though he should have forgotten the witnessing he may testify according to both Aboo Yoosuf and Moohummud. And the lawyer, Aboo Leeth, has said, 'This we adopt.' But if the document[2] be in the possession of the claimant, the witness cannot testify to it, and this is

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[1] *Hidayah*, vol. iii., p. 371, *Inayah*, vol. iii., p. 402, the explanations between the marks — — being from the latter. And see preceding page. The witness, therefore, must give his testimony absolutely, and if he should explain the source of his knowledge, and say, 'I testify because I have seen the parties living together, and comporting themselves as man and wife,' his testimony must be rejected, in the same way as in the case referred to. In the *P. P. M. L.* it is stated as a principle of Moohummudan law (p. 58, section 13), that marriage will be presumed in a case of proved continual cohabitation, without the testimony of witnesses. If by this is meant that it may be presumed by the witnesses themselves, and if absolutely stated by them, without reference to their means of knowledge, it may be so decided by the judge, it seems to be quite correct; but if it is meant that the judge may himself presume the marriage from the mere statement of the witnesses that the parties have cohabited together, the learned author's principle is not, I think, borne out by the original authority given under the same number in the Appendix to the work, which, when literally translated, is as follows:—'A person who sees a man and woman inhabiting a house, and the familiarity of married persons between them, certifies that she is his wife.' Further, it is, I think, inconsistent with the text of the *Hidayah*, taken in connection with the case of testimony to property on sight of its possession, to which that of testimony from cohabitation is likened; for if the judge must reject the testimony of the witness when it is founded on an inference, how can he make the inference himself, and found his own judgment upon it?

[2] It is so explained in the *Inayah*, vol. iii., p. 100. The word generally means *letter or handwriting*.

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approved. 'Our modern doctors,' however, have said that when the witness has no doubt as to the *khut* it is lawful for him to testify, though he should not remember the transaction, whether the document be in the possession of a party to the suit or not; and the *futwa* is in accordance with this view. If, then, the witness should give his testimony, relying on the *khut*, the judge is to interrogate him: 'Do you testify of your knowledge, or from the *khut*?' and if he should answer, 'Of knowledge,' the testimony is to be received; but if, 'From the *khut*,' it is not.[1]

Yet, if he admit that he has no other ground for his belief than the sight of his signature, the testimony cannot be received.

When a witness knows his *khut*, and remembers his declaration, and the person in whose favour it was made, he may lawfully give his testimony though he does not know the time and the place.

A man having written his will, says to the witnesses, 'Testify to what it contains;' but without reading it to them: the learned of 'our sect' say it is not lawful for them to testify to its contents, and this is correct. But they may testify to the contents in one of three cases: first, when the writing is read to them; second, when it is written by a third party, and read in their presence to the testator, who has then called on them to attest; third, when he writes it before the witnesses, they having knowledge of its contents, and then says to them, 'Testify against me to what is contained therein.' But though he should write it before them, and they should be cognisant of its contents, yet if he did not call on them to testify against him, it would not be lawful for them to do so. This according to Aboo Aly Nusfy is when the writing is not written in the customary form, for if so written in the presence of the witnesses, and the witness knows what is in the writing he may testify, though the writer should not have said, 'Bear witness to what is in it.' And though a *khut* is not in the form of a letter, yet if it be in the form in which a *sikk*, or legal document and ac-

[1] That is, as in the preceding cases, though the witness may conscientiously give his testimony, relying on his signature, yet if the ground of his reliance be explained, the testimony must be rejected.

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knowledgments are written, and bears on its face that its contents have been attested, it is an acknowledgment obligatory on the writer.[1]

Writings are of several kinds, as already noticed.[2] First, there are the *moostubeen mursoom*, or such as are manifest, and are written and addressed in the manner that one writes to an absent person; and if a person should say that by such a writing he did not intend 'repudiation,' or 'emancipation,' for instance, he is not to be believed judicially, though his assertion may be good as between him and his conscience. With regard to such writings and their contents, a witness may lawfully testify against the writer whether he were or were not called upon to attest them. Second, there are the *moostubeen* but not *mursoom*, that is manifest without being addressed as letters; and with regard to these, if the writer has said to the witnesses, 'Attest ye,' they may lawfully testify to them against him, but not otherwise. And though a number of people should see a person write the mention of a right, as being due to another against himself, yet if he does not call on them to bear witness to it against himself, it is not obligatory on him; nor is it proper for one who knows the fact to testify to it, because the person may have been writing merely as an exercise; contrary to the case of a *kitab mursoom* (or superscribed letter), and the *kitab* (book or writing) of a broker or banker, which is proof. With regard to these, if the writer of them should deny the writing, and evidence is adduced that he wrote it, or filled it up, it is lawful, in the same way as if one had made an

Different kinds of writing.

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[1] *Futawa Humadee.* I am indebted to the learned author of the *P. P. M. L.* (see preliminary remarks, p. 56) for this important reference, which seems to make a legal document duly attested proof in itself. It is also confirmed by the common practice of Moohummudans in India, where legal documents usually terminate with such words as these—'I have written these few words that they may serve as proof (*hoojjut*) in case of need.' See Forms of *Herkern*, p. 165 *et seq.*, for several examples. The invocation of witnesses to attest a document seems analogous to the delivery of a deed in English law.

[2] *Ante*, p. 233.

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acknowledgment, and should then deny it;[1] and so are all other acts of disposal, except such as involve *hudd* or retaliation, with respect to which writings that are *mursoom* or not *mursoom* are alike.[2]

With regard to writings that are not *moostubeen*, or manifest, though the writer of them should say, 'Attest this against me,' it would not be competent for the party addressed to do so, even though he should know what was written, for a writing that is not *moostubeen* is like words not comprehended; and in this respect men and women, *Mooslim* and *zimmee*, are alike.

Facts which may be testified to though they have not been seen.

It is not lawful for a witness to testify to anything that he has not seen, except *nusub*,[3] death, marriage, consummation, and the authority of a judge; and it is competent to him to testify to these matters, when informed of them by a person in whom he has confidence. This is on a favourable construction, for by analogy it would be unlawful, since *shuhadut* (testimony) is derived from *mooshahudut*, which signifies being present; but a more favourable construction has been adopted in these cases, because the causes of them can be seen by only a few special witnesses, and rights of great importance, which are dependent on them might otherwise be injured or delayed; and it is lawful to the witness to testify to them on continuous notoriety, or information that can be confided in, it being a condition that the information shall be received from two just men, or one man and two women, in order that a kind of knowledge may be obtained thereby.[4] But it has been said that, with regard to death, the information of

When they are notorious or the witness has been informed of them by two or more just persons.

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[1] That is, a verbal acknowledgment, which has effect in itself, or, in other words, is obligatory on the acknowledger, and witnesses may therefore testify to it without being called on to do so. See *ante*, p. 418.

[2] 'Other acts of disposal,' such as sale, for instance, which have effect in themselves.—*Ibid.*

[3] The word is here, I think, intended to apply to descent from either parent.

[4] According to the saying of the Prophet, 'When thou knowest like the sun, testify.'—*Inayah*, vol. iii., p. 395.

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one man or one woman is sufficient; because sometimes only one person is present on such occasions and the sight of death is avoided; so that to require a number of witnesses might occasion inconvenience. *Nusub* and marriage, however, are not so.[1] And the witness ought to give his testimony in an absolute manner, and say, for instance, in a case of *nusub*, 'I testify that such an one is the son of such an one, in the same way as we testify that Aboobekr and Omar were the sons of Aboo Koohafa and Khuttáb, though we have seen nothing of this;' and when he explains to the judge that he testifies on hearsay, his testimony is not accepted in the same way as, when testifying to property from seeing possession, the testimony ought to be absolute, and if the witness explain by saying that he testifies because he saw it in the person's possession, his testimony is not accepted; so in like manner here.[2] And the difference between testifying absolutely, and with explanation, is that when one gives his testimony in an absolute manner, it is evident that he believes in his heart that what he is saying is true, and his testimony, therefore, is with knowledge.[3]

But the testimony must be given absolutely,

and if explained to be on hearsay, must be rejected.

Reason for this.

[1] *Hidayah*, vol. iii., p. 369: Translation, vol. ii., p. 677-8. Mr. Hamilton has substituted *cohabitation* for consummation, but it is evident that he means the latter when he says, 'Marriages and deaths are seen by few, and cohabitation by none.' The original word, *dookhool*, means literally entrance, but is technically employed to signify the consummation of marriage. That this is its meaning here is put beyond all doubt by the comment of the *Inayah* on the passage, where 'the right to the full dower, *iddut*, the establishment of *ihsan* and *nusub*,' are mentioned as the important rights that are dependent on *dookhool* (vol. iii., p. 401). It will be observed that though in the first part of the extract from the *Hidayah*, it is said that it is competent to a witness to testify in the excepted cases when informed of them by a person in whom he has confidence; yet this is afterwards explained to mean notoriety or information by at least two just persons. And see *Rep. S.D.A., Calcutta*, vol. i., p. 50.

[2] *Hidayah*, vol. iii., p. 370, and *Inayah*, on the passage, vol. iii., p. 402.

[3] *Kifayah*, vol. iii., p. 370. In the *P. P. M. L.* (p. 74, section 14) it is stated, without any qualification, that 'Hearsay evidence is admissible to establish birth, death, cohabitation, and the appointment of a kazi.' This is true (with the exception of cohabitation, see note on

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Hearsay or notoriety of two kinds.

When witnesses have testified to a matter which may be lawfully attested by hearing,[1] and said, 'We have not seen it, but it is notorious to us,'[2] their testimony is lawful. Notoriety[3] in *nusub*, &c. is of two kinds: *Hukeekee*, or actual, and *Hookmee*, or in effect. Actual is

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preceding page) in the sense that a witness may testify to the facts mentioned on hearsay, which is all that is said in the authority cited under the corresponding number of the Appendix to the work. But it is not true, I think, in the sense that the judge may himself infer the fact on hearsay evidence, which is probably the sense that would be put on the words by an English reader. For my reasons see note on page 425. In a side note to the case of Mirza Qaim Ali Beg, appellant, *v.* Mt. Hingun and others, respondents (*Rep. S. D. A.*, Calcutta, vol. iii., p. 152), it is stated that, 'According to the Moohummudan law, continual cohabitation and acknowledgment of parentage form sufficient presumptive evidence of wedlock and legitimacy.' But on referring to the opinion of the law officer (p. 154), it does not appear that it was in any respect founded on cohabitation, the acknowledgment of the child being held to be quite sufficient of itself to establish its paternity, and, consequently, the marriage of the mother, if confirmed by her. But in the case of Khajah Hidayat Oollah, appellant, and Rai Jan Khanum, respondent (Moore's *Indian Appeals*, vol. iii., p. 295), it was held that continual cohabitation, without actual proof of acknowledgment of parentage, is presumptive evidence of marriage and legitimacy. The law, however, as laid down by Mr. Macnaghten, was assumed to be correct, and was acknowledged to be so by the Bar. It is true that an opinion given by the law officer of the S. D. A. is also quoted in the judgment. There were two opinions by the same officer—the first, which is that quoted, not being deemed sufficiently explicit; and on carefully comparing them together, it appears to me that the paternity of the child was assumed in the first, as having been proved to the satisfaction of the Court, and that the second was given hypothetically on the supposition of his paternity having been acknowledged. The order of the facts in the mind of the law officer seems to have been, as it certainly is in the authority which he cited in his second opinion, acknowledgment—paternity—marriage; and not cohabitation—marriage—paternity. See further remarks on this subject in the second edition of my Treatise on the Law of Inheritance (p. 29 *et seq.*) where the authorities are examined at greater length.

[1] *Sumâ.* This is the root from which *tusoamoâ* (*ante*, note, p. 418) is a derivative.

[2] *Ishtuhuru*, literally, it is published or publicly known. The infinitive, *Ishtihar*, is commonly used in India for 'advertisement.'

[3] *Shoohrut*, from which the above is a derivative.

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when a fact is publicly known and has been heard of from so many persons[1] that it is not conceivable they should all agree in a lie; and in this kind the justice of the persons, and their use of testifying language to the witnesses, are not conditions: all that is required being that the report should be continuous or unbroken. *Hookmee* is when a fact is testified to the witness by two just men, or one just man and two just women in words of testimony; that is, when they have borne testimony without having been called upon to testify by the man in whose favour the testimony is given; for Moohummud has stated in the book of *Shuhadut*, that when one has met two just persons who testify to the *nusub* of a particular individual, and know his condition, it is competent to him to bear witness to the fact; but if the individual have set up the two witnesses to testify to his *nusub*, it is not competent to the first persons to testify to it; and if a man should come to the Zukuranee tribe, and should say to them (they not knowing him), 'I am such an one, the son of such an one,' it is not competent to them (said Moohummud) to testify to his *nusub*, until they meet two just men of his city who testify the fact to them, and Jussas, in his comment on the book has said that this is correct. It is said with regard to death, that information by one man or one woman is enough, and this is correct; and all are agreed that words of attestation are not a condition. When a person has been present at the burying of another, or has prayed over his body, this is seeing his death, so that, though he should explain, his testimony is to be received. If news should arrive of the death of a person and what is usual on occasions of death should be done, it is not competent to give information of the death, until you are informed confidently by one who saw his death.[2]

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[1] Literally, a numerous tribe.

[2] The difference between notoriety and mere hearsay seems to be that though the witness must in both cases give his testimony absolutely, explanation of the source from whence his knowledge is derived does not impair the testimony in the former case as it does in the latter; and the difference between the second kind of notoriety

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Section Third.[1]

Of Testimony to Testimony.

In what cases testimony to testimony may be received.

Testimony to testimony is lawful with respect to all rights which do not drop when there is a semblance, such as *hudd* and retaliation.[2] And as it is lawful at one step, so also is it lawful at several steps; hence, testimony to the testimony of the branches is lawful again and again, to preserve rights from being destroyed. To the testimony of a man anything less than the testimony of two men, or of one man and two women, is not lawful; and in like manner as to the testimony of a woman. But two men may lawfully testify to the testimony of two men, or of a tribe.[3] If one man should give his own testimony, and two others should testify to the testimony of another witness, that would be lawful.

How the original witness is to give his testimony to the secondary.

The form of *Ishhad*, or invocation, is as follows: The original witness should say to the secondary, 'I testify that there is due to Zeyd against Bukr so and so, and do thou testify to my testimony to that effect;' or, 'Bear witness to my testimony that I testify that such an one, the son of such an one, acknowledged so and so to me,' or, 'I bear witness that I heard such an one acknowledge to such an one so and so, and do thou testify on my testimony to that effect.' He must not say, 'Testify *from* me to that effect,' or, 'Testify *in* my testimony;' and it is requisite that the primary witness should testify in the same way as he would

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and testimony to testimony, seems to be that in the former the testimony is given absolutely, and as that of the witness himself, while in the latter it will be seen that he is merely the channel of communication between another witness and the judge.

[1] *Fut. Al.*, vol. iii., book *Shuhadut*, chap. xi., p. 618.

[2] Retaliation is exacted in a case of intentional homicide, but not where there is only a semblance of such intention, or *shoobh i amd*, as it is termed.

[3] This is contrary to the opinion of Shafei, who thought that there must be two derivative witnesses to each original witness. *Hedaya*, vol. ii., p. 710.

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testify before the judge, in order that his testimony may be transmitted to the tribunal of justice. But there is no necessity for the original witness saying, 'Such an one called on me to bear witness against him.' When a person intends to call on another to bear witness to his testimony, he should have the claimant and the person against whom the claim is made both present, and should point them out; except that when the person to be testified against is absent, and his name and lineage are mentioned, it is lawful for the witness to testify, though that would not be sufficient for the judge's decree.[1]

How the secondary is to give it to the judge.

The secondary witness, when giving his testimony, should say, 'I testify that such an one called on me to bear witness to his testimony, that such an one acknowledged to him so and so,' or said to me, 'Bear witness to my testimony to that effect;' for it is necessary that he should give his own testimony, and mention that of the original witness, and also the imposing on himself the burden of that testimony. There are longer and shorter forms than these, but the best is a mean between them. And this is most valid. If the secondary witnesses should give their testimony without saying, 'We testify to this his testimony,' their testimony would not be received. And it is necessary that the secondary should mention the name of the original, and that of his father and grandfather; insomuch that if they neglect this the judge is not to receive their testimony.

Secondary testimony is admissible:— 1. When the original witnesses are dead or absent.

The testimony of secondary witnesses is not to be received except when the original witnesses are dead, or too ill to appear before the judge, or absent at the distance of a journey of three days and three nights. This is according to the Zahir Rewayut, and the *futwa* as well. It is reported, however, as from Aboo Yoosuf, that when the original witness is at such a place that, if he were to start early in the morning, between the dawn of day and sunrise, he would not be able to return to sleep with his own people,

[1] The insufficiency may have reference to the absence of the defendant, as generally a decree cannot be given against an absent person.

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he may lawfully call upon another to bear witness to his testimony; and that though the first is the better opinion, the latter is more convenient, and that Aboo Leeth adopted it. Many more of 'our' sheikhs have also preferred this report, and the *futwa* is said to be in accordance with it.

2. When the original witness is a secluded woman.

A retired or secluded[1] woman may lawfully call a witness to receive her testimony, and though she should go out for necessary purposes, such as the bath and the like, she is still to be accounted a retired woman, provided she does not mingle with men.[2]

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[1] *Mookhudderah.* The term is in frequent use in courts of justice in India, combined with *zun*, the Persian word for woman.

[2] *Fut. Al.*, vol. iii., p. 620.

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CHAPTER IV.

OF HIZANUT,[2] OR THE CUSTODY OF YOUNG CHILDREN.

A mother has the best right to the custody of her infant child.

THE mother is, of all persons, the best entitled to the custody of her infant child during marriage and after separation from her husband, unless she be an apostate, or wicked, or unworthy to be trusted. If she is an apostate, it makes no difference whether she have joined herself to the *Dar-ool-Hurb* or not; because she is kept in prison till she returns to the faith.[3] When she has repented, her title revives. The wickedness which disqualifies a mother for the custody of her child is such wickedness as may be injurious to it—as *zina*, or theft, or the being a professional singer or mourner.[4] And a person is not worthy to be trusted who is continually going out and leaving her child hungry.[5] A mother cannot be compelled to take charge of her infant child, as she may be weak. But if there is no other relative within the prohibited degrees to take charge of it, she may be compelled to do so, to protect it from harm. And a father may be compelled to take charge of his child, if he refuse to do so after it has become independent of the care of its mother.

Next the grandmother.

When the child has no mother, or none that is entitled and competent to take charge of it, the mother's mother,

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[1] *Fut. Al.*, vol. i., p. 728 *et seq.*

[2] The word is spelt both with *futha* (*u*) and *kusrah* (*i*) in the first syllable. *Doorr ool Mookhtar*, p. 280.

[3] The reason is from the *Door ool Mookhtar*, p. 280, and in British India, where the reason cannot apply, it would seem that apostasy is no disqualification. See also the Indian Act xxi. of 1850.

[4] *Ibid.* [5] *Ibid.*

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how high so ever, is preferred to all other persons; and after her is the father's mother, how high so ever. If she be dead or married, the full sister is entitled; and failing her by death or marriage, the half-sister by the mother. On failure of her in the same way, the daughter of the full sister, and then the daughter of the half-sister by the mother. Next the maternal aunts in the same way; and then the paternal aunts also in like manner—the principle in this kind of guardianship being that the custody of an infant belongs of right to its mother's relations; and her side are preferred to those who are related to the child only by its father. The daughters of uncles and aunts, whether paternal or maternal, have no right whatever to the custody of children.

Then sisters and their daughters.

Then aunts.

The rights of all the women before mentioned are made void by marriage with strangers. But if they are married to relations of the infant within the prohibited degrees, as, for instance, when his grandmother is married to his grandfather, or his mother to his paternal uncle, the right is not invalidated. And when the right of a person drops by marriage, it revives on the marriage being dissolved. When a woman is repudiated revocably, her right does not revive till after the expiration of her *iddut*, because till then the husband's power over her still exists.

But all are disqualified by marriage with strangers.

An absolute slave, an *oom-i-wulud*, and a *moodubburah*, have no right to the custody of a child.[1] But a *mookatubah* is entitled to the custody of her own child

A slave has no right to the custody of a child.

[1] An *oom-i-wulud* is disqualified because she is still a slave, and in all that has been said of a mother's preferable right to the custody of her child, it is assumed that she is free, and either is or has been married to the father of her child. No allusion is made to the mother of a *wulud-ooz-zina*, probably because she would be excluded by the *zina* from the custody of her child, as mentioned in the preceding page. Yet in the case of Mussumát Shahjehan Begum *v.* David Munro (*Reports S. D. A., N. W. P.*, vol. v., p. 39), the court were of opinion that the single fact of cohabitation by an unmarried Mussulman woman with a Christian did not disqualify her for the custody of her natural child. But the point of *zina* being a disqualification at Moohummudan law does not appear to have been brought to the notice of the court.

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if it was born after the *kitabut*. If born before the *kitabut*, she has no right to its custody.

When it is necessary to remove a boy from the custody of women, or there is no woman of his own people to take charge of him, he is to be given up to his *âsubah*. Of these the father is the first;[1] then the paternal grandfather, how high soever; then the full brother, then the half brother by the father; then the son of the full brother; then the son of the half brother by the father; then the full paternal uncle; then the half paternal uncle by the father; then the sons of paternal uncles in the same order. But though a boy may be given up to the son of his paternal uncle, a girl should not be entrusted to him. No male has any right to the custody of a female child, but one who is within the prohibited degrees of relationship to her; and an *âsubut* who is profligate has no right to her custody. After female relatives the *âsubah* are entitled.

A mother and grandmother have the best right to the custody of a boy till he is independent of their care; and Female custody of a boy ter-

[1] A *wulud-ooz-zina* has properly no father, and a putative father is, therefore, excluded from the custody of such a child. This point is involved in the decision referred to in the last note. But the decision went farther; for it determined that the putative father of an *illegitimate* child has no right to its custody, even after it has passed its seventh year; and a suit by his executor against the child's mother was dismissed on grounds that seemed to the court to be conformable to Moohummudan as well as to English law. Indeed, a question was referred to the Moohummudan law officer, and it is said in the report that the *futwa* on this point was quite decided.—'The Mohummudan law does not allow the father to interfere with his illegitimate child, even for the purpose of education.' The expression 'illegitimate child' is an importation from the English law, and if, as is most probable, it was rendered by the term *wulud-ooz-zina* in the translation of the question submitted to the law officer, the answer could have been no other than it was. The question answered itself. But it does not follow because a child is illegitimate by English law, that he is a *wulud-ooz-zina* by Moohummudan, and if he was not the latter, there was nothing to prevent his putative father from having the right to his custody. For instance, the father might have acknowledged the child without admitting that it was the fruit of *zina*, and then under certain conditions its paternity would have been established (see *ante*, p. 405), though the child might be illegitimate according to English notions.

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minates when he is seven years old:

that is, till he is seven years old. Koodooree has said, 'till he is able to eat, drink, and perform his ablutions by himself.' But the *futwa* is in favour of the first opinion.

of a girl at puberty.

The mother and grandmother have the best right to the custody of a girl till she attains to puberty. But, according to the Nuwadir, when she begins to feel the first movements of desire, her father has the best right to her custody; and this is authentic. So long as a girl who is married has no desire, her mother's right to her custody does not cease till she is fit for matrimonial intercourse.

Male custody of a boy continues till puberty:

After a boy is independent of a woman's care, and a girl is adult, the *âsubut* has the better right to their custody, the nearer being preferred to the more remote, as already mentioned. And these are to retain the custody of the child, if a male, till he has attained to puberty; after which, if he is of ripe discretion, and may be trusted to take care of himself, he is to be set free, and allowed to go where he pleases. But if he cannot be trusted to take care of himself, the father should join him to himself or keep him by him, and be his guardian.

of a female, its continuance depends on circumstances.

With regard to a female, if she be *suyyib*, but cannot be safely left to herself, she is not to be set free, and the father ought to keep her with himself. If, however, she may be trusted to take care of herself, her father has no right to retain her, and she should be left free to reside where she pleases. If she is adult and a virgin, her guardians have a right to retain her, though there should be no apprehension of her doing anything wrong, while she is of tender age. But if more advanced in years, and of ripe discretion and chaste, they have no right to retain her, and she may reside wherever she pleases.

When a female has no guardian, she is under the control of the judge.

When a female has neither father nor grandfather nor any of her *âsubat* to take charge of her, or she have an *âsubut* who is profligate, it is the duty of the judge to take cognisance of her condition; and if she can be trusted to take care of herself, he should allow her to live alone, whether she be a virgin or *suyyib*; and if not, he should place her with some female *ameen*, or trustee, in whom

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he has confidence; for he is the superintendent of all *Mooslims*.[1]

When a father is in straitened circumstances, and a child's mother refuses to take charge of it without hire, while its paternal aunt is willing to do so, the aunt is to be preferred. When a child is with one of its parents, the other is not to be prevented from seeing and visiting it.

When a mother refuses to take charge of a child without hire, it may be committed to another.

Of the Place of Hizanut.

Where the husband and wife are residing is the proper place of *hizanut*, while the marriage subsists. So that the husband cannot leave the city where they are residing, and take the child with him out of the custody of the woman to whom it properly belongs, until the child is independent of her care; and if the wife should desire to leave the city he can prevent her, whether she have the child with her or not. The rule is the same with respect to a *mooâtuddah*, who cannot lawfully go away, whether she take her child with her or not. And the husband cannot oblige her to go.

Place of *hizanut* while the marriage between the child's parents is still subsisting.

When a separation has taken place between a husband and wife, and her *iddut* has expired, she may take the child with her to her own city, if the marriage took place there. But she cannot do so if the marriage did not take place in her own city, unless the city be so near the place of separation that if the husband should leave the latter in the morning to visit the child, he can return to his own house before night. Nor can she go to any other city than her own or that in which the contract took place on any other conditions. And the same rule is applicable to different places in the same city. When the husband and wife are people of the *sowad*, or country people, she may take the child with her to her own village, if the marriage took place there. But if the marriage took place in another village, she cannot take the child to her own village, nor to

Place of *hizanut* after dissolution of the marriage.

[1] The reason seems equally applicable to the case of a *wulud-oozzina*, who, his putative father, and apparently his mother, being excluded from his *hizanut*, or custody, is as destitute in his nonage as the female who is without *âsubah*.

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the village where it did take place, if it be distant. When, however, the village is so near that if the father should leave his own village in the morning to visit the child, he can return to his house before night, she can take the child to her own village, or to that where the marriage took place. If the father has his dwelling in the town, and she wishes to take her child to a village, she may lawfully do so, provided that it is her own village, and that she was married there, though it be distant from the town; and if it is not her own village, but still the place where she was married, she may do so in the same way as in the case of the city. But if the marriage did not take place in the village, she has no power whatever to take the child there, though the village should be near to the town. And a woman cannot take her child to the *Dar-ool-Hurb*, or a foreign country, though she had been married there, and were a *hurbee*, or foreigner, provided that her husband is a *Mooslim* or a *zimmee*. But if they were both foreigners she may.

Place of *hizanut* after the death of the child's mother.

If the child's mother be dead, and its *hizanut*, or custody, have passed to the maternal grandmother, she cannot remove the child to her own city, though the marriage had taken place there. And when an *oom-i-wulud* has been emancipated, she has no right to take her child from the city in which its father is residing. Other women than the grandmother are like her in respect to the place of *hizanut*.

When a man who takes away his child from his mother, and then divorces her, is obliged to return the child to her.

A man having married a woman at Bussorah, where she bears him a child, takes the child with him to Koofa, and there divorces the mother; whereupon she brings a suit against him for the child, contending that he must bring it back to her. If he took away the child by her own desire, he is not obliged to bring it back, and the woman should be told to go there and fetch it. But if the child was taken there without the mother's direction, he must bring it back to her. A man goes out from Bussorah to Koofa, taking his wife and child with him, and then sends her back to Bussorah and divorces her. In such circumstances, it is incumbent on him to send the child back to her, and he may be compelled to do so.

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BOOK VI.

OF MAINTENANCE.[1]

MAINTENANCE comprehends food, raiment, and lodging, though in common parlance it is limited to the first. There are three causes for which it is incumbent on one person to maintain another—marriage, relationship, and property.[2]

CHAPTER I.

OF MAINTENANCE BY REASON OF MARRIAGE.

SECTION FIRST.

Of the Maintenance of Wives.[3]

IT is incumbent on a husband to maintain his wife, whether she be *Mooslim* or *zimmee*, poor or rich, enjoyed or unenjoyed, young or old, if not too young for matrimonial intercourse;[4] and it makes no difference whether she be free or a *mookatubah*. When a wife is too young for matrimonial intercourse, she has no right to maintenance from her husband, whether she be living in his house or with her father. When an adult woman, who has not yet removed to her husband's house, asks for maintenance, she

A husband is bound to maintain his wife.

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[1] *Nufukát*, pl. of *nufukut*.
[2] *Doorr ool Mookhtar*, p. 283.
[3] *Fut. Al.*, vol. i., p. 732.
[4] As to the proper age, see *ante*, p. 54.

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is entitled to it unless he has called upon her to remove; and the *futwa* is in accordance with this view, though the lawyers of Bulkh have said that she is not entitled till actual removal.[1] If, when called upon to remove to his house, she refuses to do so of right, that is, to obtain payment of her dower, she is entitled to maintenance; but if she refuses to do so without right, as when her dower is paid, or deferred, or has been given to her husband, she has no claim to maintenance.

Unless she is a *nashizah* or rebellious.

If a woman be a *nashizah* or rebellious, she has no right to maintenance until she return to her husband's house. By this expression is to be understood a woman who goes out from her husband's house (*munzil*) and denies herself to him, in contradistinction to one who merely refuses to abide in her husband's apartment (*beit*), which is not necessary for the purpose of restraint. If, however, the house be her own property, and she forbids him from entering it, she is not entitled to maintenance unless she had asked him to remove her to his own house, or to hire a house for her. When she ceases to be a *nashizah* or rebellious, she is again entitled to maintenance. If she had once surrendered herself to him, and subsequently denies herself to him in order to obtain payment of her dower, she is not to be deemed rebellious according to Aboo Huneefa.[2] It does not appear to be a sufficient reason for refusing to live with a husband, that he is a person who does not say his prayers. If a woman should refuse to move with her husband from city to city at his pleasure, she was not entitled to maintenance

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[1] The author of the *Hidayah* seems to be of this opinion; for he says that a wife is entitled to maintenance from her husband when she has surrendered herself to him in his house, and assigns as a reason of the right that it is the *juza*, or consequence of *ihtibas*, that is, submission to *hoobs*, or restraint; placing the maintenance of a wife on the same footing as that of a person who is imprisoned on account of a right due to another, and is entitled to maintenance from him. But the commentators on the passage say that the *Zahir Rewayut* and the *Mubsoot* are the other way, and the *futwa* is in accordance with them.—*Hidayah* and *Kifayah*, vol. ii., p. 370; and *Inayah*, vol. ii., p. 299.

[2] See *ante*, p. 125.

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according to the older opinions; but in 'our' times a husband has no right to insist on his wife's going about with him on journeys, even though he have paid her dower in full.

Or is imprisoned, and he has no access to her.

When a wife is imprisoned for debt, and her husband has no access to her, she has no right to maintenance, whether she be able to pay the debt or not; and even though she were forcibly abducted or imprisoned unjustly. There is an exception, however, when the husband has imprisoned her on account of a debt due to himself.[1] When the husband is imprisoned on account of debt, whether he is able to pay it or not, and when he runs away, her right to maintenance is not impaired. So also though he were imprisoned unjustly or confined in the Sultan's gaol. The principle in cases of this kind is to look only to the state of the wife. If the obstruction to intercourse is on her part, she has no title to maintenance, and if there is no obstruction on her part she is entitled to it, without any regard to his ability or disability in either case. When a wife is an adult, but her husband a child, she is entitled to maintenance. So also when he is a *mujboob*, or is impotent, or sick and disabled for intercourse, or has gone on a pilgrimage. But when they are both children, unfit for matrimonial converse, she has no right to maintenance, the husband in such circumstances being like a *mujboob* or an impotent person who has a child for his wife.

Sickness after removal to the husband's house, or natural malformation obstructive of intercourse, does not invalidate the right to maintenance.

When a wife, before her removal to her husband's house, falls sick of an illness which is obstructive of intercourse, and is removed, notwithstanding, sick as she is, she is entitled to maintenance after her removal. She is also entitled to it before removal, if she had sought to be removed, and her husband had failed to remove her, she being still willing. But if he had asked her to remove, and she had refused, she has no right to maintenance until her removal, in the same way as if she were in health. If attacked by illness subsequent to her removal, though of such a nature as to prevent matrimonial intercourse, she

[1] *Doorr ool Mookhtar*, p. 285.

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is entitled to maintenance according to all opinions. It has been said, however, that if a woman should fall sick in her husband's house after consummation, and be removed to her father's house, she has no right to maintenance, if she can bear removal back, and is not removed. If not able to bear the removal back, she is entitled to maintenance without any question. When a woman is impervious by reason of malformation, or becomes mad, or is overtaken by any other calamity that unfits her for matrimonial intercourse, or gets too old for it, she is still entitled to maintenance whether any of these calamities have happened after her removal to her husband's house, or before it, provided she had not previously denied herself without just cause.

All wives are equally entitled to maintenance.

When a man has several wives, some of whom are free *Mooslims*, and some are slaves, they are all alike in respect of maintenance. But a woman enjoyed under a semblance of legality has no right to any maintenance. And it is said that there is no maintenance in cases of invalid marriage, or their consequent *idduts*. Insomuch that if a judge should award maintenance in respect of a marriage apparently valid, and the woman should receive it for a month, after which a defect in the marriage is discovered, by reason of witnesses coming forward and attesting that she was the man's sister by fosterage, and the judge should decree a separation, the man might have recourse against the woman for a refund of what she received; but if he had maintained her of his own good will, without any decree of the judge, he would have no claim to a refund. All, however, are agreed that in a marriage without witnesses the wife has a right to maintenance. So also when a man has put his wife under *eela* or *zihar*; and if a man should marry the sister or aunt of his wife, being in ignorance of the relationship until he had consummated, and should then be separated, whereupon it would become incumbent on him to refrain from intercourse with his wife during the *iddut* of her sister, the wife would be entitled to maintenance, but not so her sister, though obliged to observe the *iddut*.

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A wealthy husband must maintain his wife's servant.

When a man is rich,[1] and his wife has a servant, it is his duty to maintain the servant, provided the wife herself be free. But if she is a slave she has no right to the maintenance of a servant; and if she have two servants, or more, she is not entitled to the maintenance of more than one. There is some difference of opinion as to the kind of servant which a husband is bound to maintain. It is said that she must be a female slave of the wife, and, according to the Zahir Rewayut, he is not liable for the maintenance of any other than such a servant. If the husband be poor,[2] he is not bound to maintain his wife's servant, though she should happen to have one; according to what Husn has reported as from Aboo Huneefa, and as is most correct. When a husband says to his wife, 'I will not maintain your servant, but I will give you one of my own to serve you,' and the wife refuses her assent, he is not entitled to insist, but may be compelled to maintain her own servant.

In what circumstances maintenance is to be awarded against a husband who is present.

When a woman sues for maintenance against her husband, and he appears to the action, and is a man liberal in his living, as having a well-supplied table,[3] the judge is not to decree against him though called upon by the wife to do so, unless it appears that he beats his wife and does not maintain her, in which case maintenance is to be decreed to her. If the husband is not a person who keeps a well-supplied table, the judge is to decree the wife's maintenance every month, and order the husband to pay it. When a monthly maintenance is decreed, it should be paid every month, and if not paid, and the wife has to demand it every day, she may do so in the evening. When the judge is to pass his decree, and the husband is rich, eating white bread and roast meat, while the woman is poor, or the reverse is the case, the condition of both should be taken into consideration, according to one set of opinions; but in the Zahir Rewayut it is said that regard should be had only to the condition of the man; and there are

And how it is to be regulated.

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[1] *Moosir*. Literally, 'in easy circumstances.' See *post*, p. 465.

[2] *Mooûssur*. Literally, 'straitened.'

[3] Literally, 'master of a good table.'

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also many opinions in favour of this view.[1] The *Futwa*, however, is said to be in accordance with the other.[2] When a judge has once decreed maintenance according to the rate of poverty, and the husband afterwards becomes rich, and the matter is again made the subject of contest, the maintenance should be completed up to the standard of the wealthy.

Wife should be supplied with food ready dressed, or means of preparing it.

If the woman be of a family where females are not accustomed to do menial services for themselves, she ought to be supplied with food ready dressed, or the means of baking or cooking, and in any event should be furnished with all necessary and proper utensils. In these matters there is a difference between the wife and her servant, who, if she refuses to perform such offices for herself, has no right to maintenance from the husband of her mistress.

What is proper food.

Proper maintenance comprehends food, raiment, and lodging, as already observed; and food is meal or flour, water, salt, wood, and oil. As a husband should give his wife a sufficient supply of food, so ought he also to furnish her with such condiments as are usually eaten therewith. He ought also to furnish her with whatever is necessary for cleanliness according to the customs of the place, and a sufficiency of water to wash her person and clothes. But he is not bound to give her what administers to delight and enjoyment, such as *khuzab* and *kohl*, which he may give or withhold at his pleasure. But if he gives them, it is incumbent on her to make use of them. Nor is he under any obligation to furnish her with perfumes, except only so far as may be necessary to subdue the odour of perspiration; nor even to supply her with medicine in sickness, nor the hire and fees of a physician, bleeder, or shaver.[3]

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[1] This view has the support of a text of the Korán; but there is a traditional saying of the Prophet which favours the view that regard should be had 'to the circumstances of the woman;' and hence it is inferred that regard should be paid to the circumstances of both. See *Hedaya*, vol. i., p. 393.

[2] The *Kafee* is cited and it is confirmed by the *Inayah*, vol. ii., p. 300.

[3] *Hujjamah*, the feminine of *hujjam*, a surgeon-barber.

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When a man goes to the country, leaving his wife in town, the judge may decree her maintenance against him, notwithstanding his absence, and it is not necessary for this purpose that he should be absent on a journey. If he has left substance in his house of the same nature as is required for her maintenance, such as *dirhems* and *deenars*, or food, or cloth suitable for apparel, the judge may direct her to take out of that a sufficiency for her maintenance. And when the absent man has left property in the hands of a third party, maintenance may be decreed to her out of such property, whether it be held in trust, or deposit, or *moozarubut*, for him. In all cases in which a judge may decree maintenance to a wife out of the property of her husband, she may lawfully take it herself out of the property without his order, to such an extent as may be justified by common usage. But where the property left by a husband in his own house or in deposit, is of a different nature from that which a woman is entitled to for maintenance, it can neither be sold by herself nor by the judge on account of her maintenance. And upon this point all are agreed.

When maintenance may be decreed out of the property of an absent husband.

Or taken by the wife herself.

A man is not to be separated from his wife for inability to maintain her. But the judge may direct her to raise her maintenance by borrowing on his credit. And if a judge should decree a separation, the decree would not be valid; nor even though allowed by another judge would it become operative, because it is not within the power of a judge to pass such a decree, for the reason already given, that inability to maintain a wife is not a sufficient reason for separating the parties.

Inability to maintain a wife is not a sufficient ground for separating her from her husband.

When a woman sues her husband for maintenance for a time antecedent to any order of the judge, or mutual agreement of the parties, the judge is not to decree maintenance for the past. When a woman incurs debt as against her husband before any decree of the judge or mutual agreement of the parties, she has no right of recourse against her husband whether he were absent or present. But if she should disburse anything for her maintenance out of her own property after the decree

Arrears of maintenance are not due unless after decree or agreement of parties.

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of the judge or a mutual agreement of the parties, she has a right of recourse against her husband. And so also when she contracts debt on account of it as against her husband, whether with or without the judge's permission; except that when it is without his permission, she herself is alone responsible, and the creditor cannot have recourse against the husband, while if it is with the judge's permission, she can transfer the responsibility to her husband so as to give the creditor a right of action against him.

Nor even then if the marriage is dissolved by death or repudiation.

When maintenance has been decreed against a husband at so much the month, or the parties have come to a mutual agreement for so much each month, and several months are allowed to pass without his giving her anything, and she in the meantime raises her maintenance on credit, or disburses it out of her own property, and then either the husband or the wife happens to die, the whole of what has been so raised or disbursed drops, or can no longer be recovered. And in like manner, if he should repudiate her, any arrears of maintenance that may have accumulated after the decree of the judge are irrecoverable. In the case of maintenance taken up on credit there is, however, a difference when it has been done in pursuance of the judge's order; for in that case it may be recovered notwithstanding the death of either of the parties, or the repudiation of the wife by the husband.

But advances of maintenance cannot be reclaimed.

And neither in the case of death nor of repudiation is a wife obliged to restore any maintenance which may have been paid to her in advance, though it should still be in her hands, unexpended. The same rule is applicable to raiment. And if a man should give maintenance to a wife whom he had repudiated three times, during the *iddut* necessary to render a remarriage lawful, with a view to remarrying her, and she should refuse to marry herself to him, he may in all cases, according to the most authentic reports, reclaim it, whatever may have been the conditions under which the money was paid, because in such circumstances it is a bribe.

When a husband is known to the judge to be poor, he

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is not to imprison him on account of his wife's maintenance. And when the judge is not cognisant of the fact, but the wife calls upon him to imprison her husband, he is not to do so at once, but to order him to pay, and warn him that if he fail to do so he will be imprisoned. If after all this the woman should return to complain twice or thrice, the judge is then to imprison him; and when he has kept him in prison two or three months according to some, and four according to others, but more properly for such a time as in the discretion of the judge may be sufficient to test his inability, he is to release him from gaol, but not to forbid the creditor from following him. Nay, she is still entitled to demand of him wherever he may go, and never to let him rest till he pay her, though he cannot be interdicted from the exercise of his powers of disposal. If the husband be rich, he is not to be released from prison till he pay the maintenance, unless with the consent of the wife. When maintenance has been decreed against a husband and he refuses to pay it, though rich, and the wife demands that he be imprisoned, the judge may order him to be imprisoned; but it is not proper to do so on the first application, and he should postpone the matter two or three sittings, exciting or stimulating the husband on each occasion by having the matter brought before him: and if the husband should still persist in refusing to pay, he is at length to be imprisoned, as in the case of an ordinary debtor.

Husband may be imprisoned for wife's maintenance, unless disabled by poverty.

Maintenance does not cease on the husband's imprisonment; and the wife may be directed to raise it on credit, to the end that she may still have recourse for it against her husband. When the husband has been imprisoned, the judge may direct maintenance to the wife out of any property belonging to the husband of the same kind, to be delivered to her; but when the property is of a different kind it cannot be sold, according to Aboo Huneefa, and all that can be done is to direct the husband to sell it; but both the disciples were of opinion that such property may lawfully be sold. And that being the case, in their opinion a commencement should be made with the sale of chattels,

The right to maintenance continues notwithstanding husband's imprisonment.

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and if these should not be sufficient for the maintenance, recourse may then be had to the sale of *âkár*, or immovable property.

Surety for maintenance.

A woman complains that her husband is about to be absent from her and demands a surety for her maintenance; she has no right to it, according to Aboo Huneefa, but according to Aboo Yoosuf it ought to be allowed for one month on a favourable construction.

When given, how long liable.

And when a surety is given by the husband for the maintenance of every month, the surety is bound for only one month. But if the surety should say, 'I am surety to you on behalf of your husband for a year's maintenance,' the surety would be bound for the whole year; and in like manner if he say, 'I am surety for your maintenance for ever,' or 'while you live,' he is bound so long as the marriage subsists.

Release from maintenance.

When a woman has released her husband from maintenance, by saying, 'You are free from my maintenance so long as I am your wife,' the release is void if the judge had not at that time decreed her maintenance; and if he had decreed her maintenance at the rate of ten *dirhems* a month, the release would be valid as to the maintenance of the first month, but not for the maintenance of any more than that month; and if she should say to him, 'After thou hast waited a month I have released thee from my maintenance for the past and for the future,' he would be released for the maintenance of the past, and also for the maintenance of one additional month, but not for any more. And if she should say, 'I have released you from the maintenance of a year,' he would not be released except for the first month, unless maintenance had been decreed for the year.

Composition for maintenance.

When a man compounds with his wife for her maintenance at three *dirhems* a month, it is lawful. The principle in cases of composition is, that if it be made for something which a judge could lawfully decree immediately as maintenance against the husband,[1] the composition is to be

[1] See *ante*, p. 447.

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taken as a measure of the maintenance, not as something taken in lieu of it, and *that* whether the composition have taken place before or after a decree of the judge awarding her maintenance, or a mutual agreement of the parties for so much the month. While if the composition be for something which the judge could not lawfully assign as maintenance—such as a slave, for instance, or a piece of cloth—it is only when it takes place before the decree of the judge, or the mutual agreement of the parties for so much the month, that it is to be regarded as a measure of the maintenance; for, if the composition should not take place till after the decree or mutual agreement for so much the month, the composition would be regarded as something given and taken in lieu or exchange for it. And the difference between a composition regarded as a measure of maintenance, or as something in lieu of it, is this, that in the former case it admits of increase or reduction while it does not admit of either in the latter. Thus, in the case already put of a composition for three *dirhems* every month, if the wife should afterwards say, 'This amount is not sufficient for me,' she is at liberty to litigate the matter for such an increase as may suffice, if the husband be rich; and if the husband should say, 'I am unable to pay so much,' though the judge is not to believe him on his mere word, yet if he find on inquiry that it is confirmed by the information of others, he may reduce the amount to what he is able to bear. And if the composition were for a piece of cloth, and it subsequently transpires that another person is entitled to it, then if the composition took place after the judge's decree, or an agreement of the parties between themselves, the woman would have a right of recourse against her husband for the amount decreed or agreed upon; while if the composition took place before the decree or agreement, she could have recourse only for its value. What has been said with regard to compositions for maintenance, is also applicable to compositions for clothes.

When a woman makes a composition for her maintenance and dress, and it is not much in excess of what is suitable to

The composition

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must be reasonable.

one of the like condition, the composition will hold good; but if the excess is beyond all reasonable bounds, it must be returned, and the woman be content with the dress and maintenance of her equals.

A slave may be sold for his wife's maintenance.

When a slave marries with the permission of his master, he is personally liable for his wife's maintenance, and may be sold repeatedly on account of it. The master may, however, ransom him; and if the slave should die the liability ceases, whether the death be natural or by violence.

Case of marriage between slaves of the same master.

When a man marries his female slave to his male slave the master is liable for her maintenance, whether he give her a separate place to live in or not, and dispense with her service or not; and if he refuse to maintain her he may be compelled.

Under what circumstances the husband of a slave is liable for her maintenance.

When a wife is a slave and her master allows her to live with her husband, and dispenses with her service, the husband is liable for her maintenance. While her services are required by her master the husband is not liable for her maintenance; but if, while she is living with her husband she should be coming and going to her master, and doing service without any positive requisition on his part, it is said that her husband would still remain liable to maintain her.

Rules with regard to wife's dress.

The dress, which it is incumbent on a husband to supply to his wife, is what is customary, and in quantity it must be suited to the season of the year, whether summer or winter. It is to be decreed twice a year for six months at a time, and if decreed for six months, she is not entitled to any more before the expiration of the term. If, then, the dress be torn within the term, and it should appear that if worn or used in the customary way this would not have happened, he is not liable for another, but otherwise he is liable; while if, on the other hand, the dress should still be good at the expiration of the term, and it should appear that this has happened in consequence of its not having been worn, or only partially, and alternately with other clothes, she would be entitled to another dress, but otherwise not. It is also incumbent on the husband to give his wife a proper bed or cushions to sit or lean upon, according to his condi-

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tion; and in all cases where a husband is bound to supply the maintenance of his wife's servant, he must also supply the servant's dress.

Rules with regard to wife's lodging.

A husband must lodge his wife in a *beit* or apartment free from the intrusion of his, or even her own people, without her permission; and when a husband has lodged his wife in a *munzil*, or house by herself, and she complains to the judge of his beating and vexing her, and prays that her husband may be directed to lodge her among good people, who may be able to know whether he treats her well or ill, the judge should, if cognisant that the facts are as stated, rebuke the husband and forbid him to ill-treat her. If the judge is not cognisant of the facts, and the neighbours among whom she has been placed are respectable, he should inquire of them, and either rebuke the husband or reject the complaint, according to the answer he may receive from them to his inquiries. If, on the other hand, they are persons in whom he has no confidence, or who evidently lean towards the husband, the judge should order him to place her among good people, and then be guided in his future proceedings by the information which he may receive from them. A woman refuses to live with a co-wife, or relation of her husband, such as his mother:—if there be several apartments in the house, and she has one with a separate lock to herself, she cannot demand another from her husband; but if there be only one apartment, she may make such a demand. She has no right to say, 'I will not live with your female slave or with your *oom-i-wulud*.'

Matrimonial restraint as to a wife's visiting.

There is some difference of opinion as to how far a husband can prevent his wife's parents and relations from entering his house to visit her; but, according to 'our' sheikhs he cannot prevent her parents from entering to her in his house on Fridays, though he may forbid their remaining with her; and the *futwa* agrees with this. In like manner, he cannot prevent her from going out to them once every Friday, the *futwa* being in accordance with this also. But may he prevent other persons than her parents from visiting her? Some say that he cannot prevent those

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within the prohibited degrees from visiting her once a month, but, according to the sheikhs of Bulkh and the *futwa*, it is only once in the year, and the rule is the same with the same difference of opinion as to her going out to visit her relatives within the prohibited degrees, such as her aunts, paternal or maternal, and sisters. But a husband cannot prevent her parents or her child by another husband from seeing and conversing with her at any time.

Does not prevent a wife from going out on business, or for pilgrimage.

If a wife has rights against other parties, or others have rights against her, she may go out, with or without her husband's permission. And so also as to pilgrimage. But as to receiving and returning the visits of strangers, and going out to marriage feasts, a husband should not allow them, nor should she go out for such purposes; and if he allow her, and she does go, they both incur the guilt of sin. He should also prevent her from going to the *hummam* or public baths. If he allow her to go out to a meeting for 'exhortation without novelty,' there is no objection; but she should not travel with her slave though an eunuch, nor with her *majoosee* son, nor, in 'our' time, with her foster-brother, nor with another woman. A girl too young for sexual feelings may travel with a husband's son or mother's husband.

A wife is not allowed to fast, except as of positive duty.

A wife is not entitled to give anything out of her husband's house without his permission; nor to fast, except as of positive duty.

Section Second.

Of the Maintenance of a Mooâtuddah.

A woman separated from her husband for any cause than her own fault, is entitled to maintenance during *iddut*.

A *mooâtuddah* on account of repudiation is entitled to maintenance and lodging, whether the repudiation be revocable, or irrevocable, or triple, and whether she be pregnant or not. The principle of this is, that when separation is induced by any cause proceeding from the husband, or by any cause proceeding from the wife in exercise of a right, or by any cause proceeding from a third party, the wife is entitled to maintenance during her *iddut*.

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But if the separation is induced by any fault of the wife, she is not entitled to it. A *mooláunah*, or imprecated woman, is entitled to maintenance and lodging. So also a woman separated by *khoolâ* or *eela*, or by reason of the apostasy of her husband, or of his having connection with her mother. So also the wife of an impotent man, when she elects to be separated from her husband, and a young girl who avails herself of the option of puberty on arriving at the proper age, and a woman who after consummation has been separated from her husband for inequality. But if a woman should apostatize, or submit to the embraces of her husband's son or father, or should touch them with desire, she would have no title to maintenance. Otherwise, however, if the connection were against her will.[1] And she does not lose her right to lodging whatever be the cause of separation; because residence with her husband is in consequence of a right which he has over her, while maintenance is in consequence of a right which she has against him.[2]

When a wife who has apostatized returns to the faith while her *iddut* is still subsisting, she has no right to maintenance; contrary to the case of a *nashizah*, or rebellious wife, who has been repudiated and returns to her allegiance during the *iddut*; for she regains her title to maintenance. The principle of this is, that when a woman's right to maintenance is made void, not by the cause of separation, but by some other cause supervening during her *iddut*, it revives with the removal of the cause; and that when the right to maintenance is made void by the separation itself, it is not revived by the removal of the cause. When a woman has been repudiated three times, and has then apostatized, her right to maintenance drops; but it is by reason of the imprisonment to which she is liable, and not of the apostasy (for if she is not imprisoned, but allowed to remain in her husband's house, she continues to be entitled to maintenance); and, therefore, if she repents and returns to her husband's house, her right

When excluded from maintenance by the cause of separation, she does not become entitled by removal of the cause.

[1] *Kifayah*, vol. ii., p. 385. [2] *Ibid.*

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revives by the removal of the supervening cause, that is, the imprisonment. It is necessary that the repudiation be triple or absolute; for a *mooâtuddah* on account of a revocable repudiation, when she apostatizes, has no right to maintenance, whether she be imprisoned or not.

A widow is not entitled to maintenance during her *iddut*.

A widow has no right to maintenance, whether she be pregnant or not; because the restraint to which she is liable is for the sake of the law and not of her husband, the *iddut* of widowhood being a religious observance, for which reason it is that it is reckoned by months, and not by courses, as it would be if the object were merely to ascertain whether she is pregnant or not.[1] An *oom-i-wulud* when pregnant is entitled to maintenance as against the whole of the estate of her deceased master.

When the right to maintenance may be lost during *iddut*.

When *iddut* has become incumbent on a woman, and she is imprisoned on account of any right against her, the right to maintenance drops. And when a *mooâtuddah* does not confine herself to the house of her *iddut*, but abides there at times, and comes out at times, she has no right to maintenance. When a woman who is *nashizah*, or rebellious, is repudiated, she may return to her husband's house, and take her maintenance.

Amount determined in the same way as that of a wife.

As a *mooâtuddah* is entitled to maintenance during her *iddut*, so also she is entitled to clothing. Her maintenance must be sufficient, according to a medium of sufficiency. It is not a fixed sum, but is like the maintenance of marriage, and is to be determined in each case by the like considerations.

Maintenance cannot be recovered against a husband unless claimed or decreed during the *iddut*.

A *mooâtuddah* who has neglected to sue for her maintenance, and to whom none has been assigned by the judge, till the expiration of her *iddut*, has no longer any right to it. And even though maintenance should have been assigned to her by the judge, yet if she receive nothing from her husband till the expiration of her *iddut*, she has no recourse against him unless she had actually incurred debt on account of it by direction of the judge.

A man absents himself from his wife, and she marries

[1] The reason is from the *Hedaya*, vol. ii., p. 384.

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another husband who consummates with her; the first husband then returns, and the judge pronounces a separation between her and the second, whereupon an *iddut* becomes incumbent on her; yet she is not entitled to maintenance during it, either from the first husband or the second. A man repudiates his wife three times after consummation, and before the expiration of her *iddut* she marries another who consummates with her, and the judge then makes a separation between them; she is entitled to maintenance and lodging from the first husband, according to Aboo Huneefa. When a man's wife intermarries with another man who consummates with her, and the judge then makes a separation between them, after which the first husband, getting information of the facts, repudiates her three times, though an *iddut* is incumbent on her for both husbands, she is not entitled to maintenance from either.

Case of a woman marrying during her husband's absence, or before the expiration of her *iddut*.

When a man repudiates his wife irrevocably—she being a slave whom her master had permitted to reside with her husband, so as to entitle her to maintenance from him—and her master then recalls her to his service (by which means her right to maintenance drops), but subsequently wishes to return her to her husband that she may receive her maintenance from him, he may lawfully do so. But if he had never permitted her to reside with her husband, until the repudiation took place, he would then have no right to return her on his hands during the *iddut* so as to oblige him to maintain her.

A woman cannot acquire during the *iddut* a right to maintenance which she had not at the time of separation.

The principle in this case is that if a woman who is entitled to maintenance at the time of repudiation should by any means lose her right to it during the *iddut*, she may return and reclaim it from her husband; but that a woman who is not entitled to maintenance at the time of her repudiation, can have no right to it during the *iddut*, with the single exception of a *nashizah*.[1] When a man has emancipated his *oom-i-wulud*, she has no right to

[1] This seems merely a different way of expressing the rule on p. 455.

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maintenance during her *iddut*; and in like manner if her master should die, so that she would be emancipated by his death, she would have no right to maintenance out of his estate; but if she has a child, her maintenance will be out of the share of her child.*

A wife is entitled to maintenance during an investigation relating to an irrevocable repudiation if the marriage was consummated.

When two witnesses testify against a man that he has repudiated his wife thrice, the judge ought to prohibit him from having connection with her whether she be suing for or denying the repudiation, while he is employed in the purgation of the witnesses; but he is not to remove her at this stage from the house of her husband, and should place a female *ameen* with her to forbid the approach of her husband, even though he be a just man. The maintenance of the *ameen* is to be paid out of the *beit-ool-mal*, or public treasury; and if the wife should demand maintenance, the judge is to award it for the time of the *iddut*, if consummation had taken place, but otherwise not, until he can make his investigation regarding the witnesses; and if the inquiry should be prolonged till the expiration of the *iddut*, no further maintenance is to be assigned. If the purgation should turn out in favour of the witnesses, the judge is then to make a separation between the parties, and to deliver to her the maintenance; otherwise she must, if she had received it, restore it to her husband.

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CHAPTER II.

OF THE MAINTENANCE OF CHILDREN.

A father must maintain his young children;

A FATHER is bound to maintain his young children; and no one shares the obligation with him. When the child is a suckling, and its mother is married to the father she cannot be compelled to suckle it if the child will take the milk of another woman. But if the child refuses the milk of any other than the mother, she may be compelled to suckle it, though there is some difference of opinion on the subject. And if neither the father nor the child has any property, the mother may be compelled to suckle it, according to general agreement.

and hire a nurse for an infant;

The father is obliged to provide a nurse for his infant child at his own expense when the child has no property of its own. When it has property, the expense of suckling may be taken out of the property. The nurse should be hired to suckle the child at the mother's residence, when one can be found to do so. But a nurse is not obliged to remain by the child in the mother's apartment, if that were not part of the agreement, and the child can do without her in the intervals of suckling. When the nurse refuses to suckle the child at the mother's residence, and there was no stipulation in the contract of hiring that she should do so, she may take the infant away to her own house, and suckle it there. If it were made a condition that she should suckle it at the residence of the child's mother, she must act in conformity with her agreement. When a man's absolute slave, or *oom-i-wulud*, has borne him a child, he may compel her to suckle it, because her milk and her services are both the property of her master;

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or he may deliver the child to another woman to be suckled, even though the mother should desire to suckle it herself. When a nurse has been hired to suckle a child for a month, and the month has expired, but the child refuses to take the milk of another woman, the nurse may be compelled to renew the contract of hiring to nurse the child.

but cannot hire his wife to suckle her own child.

It is not lawful to hire the child's own mother to suckle it while she is the wife of the father, or in *iddut* to him for a revocable repudiation. If the *iddut* be for an irrevocable or triple repudiation, she is entitled to hire for suckling her child. After the expiration of her *iddut*, there is no objection to the hiring of the child's mother to suckle it, and if the father should bring another woman for that purpose, the mother being willing to suckle it at the same hire as the strange woman or without any hire at all, she is entitled to the preference. A man may lawfully hire his wife or *mooâtuddah* to suckle his child by another woman.

After a child has been weaned, its maintenance should be delivered to its mother.

After a child has been weaned, the judge is to assign maintenance for it agreeably to the condition of the father, and deliver it to the mother to be expended on the child. But if confidence cannot be placed in the mother, the maintenance is to be committed to some other person to be laid out for the child's benefit.

A poor man may be compelled to work for his children's maintenance

If a man who is in straitened circumstances, and has a young child, is able to earn anything for its maintenance, it is incumbent on him to do so, and if he refuse he may be imprisoned. Though he should be unable to earn anything, the judge is still to decree maintenance against him, and to direct the mother to borrow for it on her husband's credit, and when he is in easier circumstances she may have recourse against him for it. In like manner, when the father is able, but refuses, and the judge has decreed the maintenance of a child against him, or when, after decree against him, he abandons the child without leaving the means of subsistence, and the mother incurs debt for its maintenance under the direction of the judge, she may have recourse to her husband for it, and the father may be

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imprisoned for the maintenance of the child, though he should not be liable to imprisonment for other debts.

An infidel may be compelled to maintain his *Mooslim* child; and, in like manner, a *Mooslim* may be compelled to maintain his infirm infidel child.

An infidel may be compelled to maintain a *Mooslim* child, and *vice versâ*.

The maintenance of a boy after he has been weaned may be taken out of his own property when he has any.[1] If the property is not available, the father may be ordered by the judge to maintain him, reserving his recourse against the property; but if the father should maintain him without such order, he has no such right of recourse unless he had called on witnesses at the time to attest that he reserved his remedy against the property. And if the child has lands, cloaks or other clothes, the father may sell the whole of them, if necessary, for his maintenance.

When a boy has property, his maintenance, after weaning, may be taken out of it.

When the father is poor and the child's paternal grandfather is rich, and the child's own property is unavailable, the grandfather may be directed to maintain him, and the amount will be a debt due to him from the father, for which the grandfather may have recourse against him; after which the father may reimburse himself by having recourse against the child's property if there be any. When the father is infirm and the child has no property of his own the paternal grandfather may be ordered to maintain him without right of recourse against anyone; and, in like manner, if the child's mother be rich, or its grandmother be rich, while its father is poor, she may be ordered to maintain the child, and the maintenance will be a debt against the father if he be not infirm, but, if he be so, he is not liable.

Liability of the paternal grandfather.

A mother is the first of the kindred to take the burden of maintenance; so that if the father is poor, and the mother is rich, and the young child has also a rich grandfather, the mother should be ordered to maintain the child out of her own property, with a right of recourse against the father; and the grandfather is not to be called upon

The mother is liable next after the father for the maintenance of her children.

[1] Though the word in the original (*subee*) is masculine, I think it includes female children also who have property: see *ante*, p. 450.

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to do so. When the father is poor, and has a rich brother, he may be ordered to maintain the child, with right of recourse against the father.

A father may require his male children to work for their maintenance when strong enough.

When male children have strength enough to work for their livelihood, though not actually adult, the father may set them to work for their own maintenance, or hire them out, and maintain them out of their wages; but he has no power to hire females out for work or service. When a father has set his male children to work, and they are earning something, he should lay by the surplus of their earnings, if any be left after providing for their maintenance, until they arrive at puberty. But if the father be a spendthrift, he is not to be entrusted with the surplus, and the judge should take it out of his hands, and place it with a trustee, to keep for the boy until he arrive at puberty, and then to deliver it over to him. Hulwaee has said that the sons of the better orders,[1] whom it is not the practice of men to set to hire, are to be treated as weak; and so also students of learning, when unable to earn anything; and their right to maintenance from their fathers does not abate while engaged in legal studies.

Females must be maintained till marriage.

A father must maintain his female children absolutely until they are married, when they have no property of their own. But he is not obliged to maintain his adult male children unless they are disabled by infirmity or disease. Though one is actually able to work, yet if work is not suitable or proper for him, he is held to be weak and unable. It is also incumbent on a father to maintain his son's wife, when the son is young, poor, or infirm. It is stated, however, in the Mubsoot that a father cannot be compelled to maintain the wife of his son. When an adult male who is weak or lame, or has both his hands withered so as to be unable to use them, or is insane or paralytic, has property of his own, he is to be maintained out of it; but if he has none, and his father and mother are in easy circumstances, the father is bound to maintain him.

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[1] Arab., *Kuram*, pl. of *Kureem*, generous, noble.

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A woman may compound for the maintenance of her young children.

When a woman has compounded with her husband for the maintenance of their young children, the composition is lawful, whether the husband be rich or poor; but if it should afterwards appear that the maintenance is much in excess of what is requisite, it may be reduced, and if insufficient, it must be made up to the proper amount.

Persons to whom maintenance may be assigned by the judge out of the property of an absentee.

When a man is absent, but has left available property, maintenance may be ordered out of it by the judge to the following persons if they are poor, but to none other, viz., his parents; his male children if young, or, though adult, if unable to gain their livelihood; his female children, whether young or adult; and his wife. If the property is in the hands of the parties themselves, the judge may direct them to take their maintenance out of it. So also when the property is in deposit with another person, or the absentee has credits owing to him, maintenance may be ordered out of the property or credits.

The same persons may take their maintenance out of an absentee's property in their own hands;

When the absentee has left property in the hands of his parents, wife, or child, of the same kind as that to which they are entitled for maintenance, they may lawfully take it for that purpose, without incurring any responsibility. But if another person in whose hands there is property of the absentee should give them maintenance out of it without the order of a judge, he would be responsible. When the property which the absentee has left in the hands of his parents, wife, or child, is of a different kind from that to which they are entitled for maintenance, all are agreed that none but the father can dispose of it. A father can sell the chattels of an adult son who is absent, but he cannot sell his *âkár* or immovable property; and he can sell both the chattels and the *âkár* of his minor or insane son who is absent, on account of his own maintenance, and that of the wife and child of the absentee.[1]

but a father only can sell the property.

Maintenance of persons entitled to share in

When a person has died leaving property and young children, their maintenance is to be taken out of their shares in the estate. And the rule is the same with regard to all others who have any share in it; including his

[1] *Doorr ool Mookhtar*, p. 293.

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an inheritance to be taken out of their shares.

wife, whether she be pregnant or not. If the person has left an executor, it is his duty to maintain the minor children out of their shares, otherwise the judge should order to each of them out of his share as much as may be required for that purpose, and buy, if necessary, a servant for them, together with whatever else may be required. When no executor has been appointed by the deceased, who has left both adult and minor children, the judge should appoint an executor; and if there be no judge, and the elder children maintain the younger out of their shares of the property, though they are legally responsible, they are justifiable, as between themselves and their consciences, for so meddling with the shares of the younger children.

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CHAPTER III.

OF THE MAINTENANCE OF RELATIVES.

A CHILD in easy circumstances may be compelled to maintain his poor parents, whether they be *Mooslim* or *zimmee*, and whether they are able to earn anything for themselves or not. But he is not obliged to maintain them if they are *Hurbees*, or aliens, though *moostamins*. No one shares with a child the obligation of maintaining his poor parents. By easiness of circumstances is to be understood the possession of property equal to a *nisab*, according to Aboo Yoosuf, whose opinion has been adopted for the *futwa*. And the *nisab* in question is that the possession of which forbids the acceptance of alms, or, in other words, a surplus of 200 *dirhems* over one's own necessities.[1]

Children in easy circumstances are bound to maintain their poor parents, though able to earn something for themselves.

When there is a mixture of male and female children, the maintenance of both parents is on them alike. So, also, if a man has two sons, one having only a *nisab* and the other his superior in wealth, or one a *Mooslim* and the other a *zimmee*, they are both equally liable; and if the judge has decreed maintenance against both, and one refuses to give his share, the other should be ordered to pay the whole, with a right of recourse against the defaulter for his proportion. A son is not obliged to maintain the wife or *oom-i-wulud* of his father, not being his own mother, unless the father is weak and helpless, and requires the assistance of a servant. In that case, the son may be compelled to supply the maintenance of some one

Male and female children are equally liable.

[1] The description of *eesar*, or easiness of circumstances, is from the *Hidayah* and *Kifayah*, vol. ii., pp. 393–4.

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to aid him; and it matters not whether the person is a wife or a slave. When the father has two or more wives, the maintenance of one should be delivered to him to dispense among them all. If a father who is poor has young children who are in want, and an adult son who is in easy circumstances, the latter may be compelled to maintain both the father and the young children.

A son in straitened circumstances is bound to maintain his mother when poor.

When a mother is poor, her son is bound to maintain her, though he be in straitened circumstances himself, and she not infirm. When a son is able to maintain only one of his parents, the mother has the better right; and if he have both parents and a minor son, and is able to maintain only one of them, the son has the preferable right. When he has both parents and cannot afford maintenance to either of them, he should take them to live with him, that they may participate in what food he has for himself.

And a son who, though poor, is earning something, is obliged to support his poor father who is earning nothing.

When a son, though poor, is earning something, and his father is infirm, the son should allow the father to share his food with him. And when a father who is poor and earning nothing applies to the judge against a son, who, though also poor, is earning something, saying, 'My son earns enough to maintain me,' the judge should inquire into the earnings of the son, and if there is any surplus above his own food he should constrain him to maintain his father; if there is no surplus above his own food, a judicial order cannot be passed against him, but as a matter of conscience he may be required to maintain his father. This is when the son is alone. If he has a wife and young children, all that he can be compelled to do is to bring his father into his family and maintain him like one of them; and he is not obliged to provide him with separate maintenance. When the father is able to earn something for himself, opinions differ as to the son's liability to maintain him, some saying that he is liable and others that he is not.

Grandparents are also entitled to maintenance

A grandfather is entitled to maintenance on the sole condition of being poor, as in the case of a father; and a grandfather on the mother's side is like a grandfather on the father's; and grandmothers on either side are also

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entitled to maintenance, being in this respect like grandfathers. from their descendants.

Every relative within the prohibited degrees is entitled to maintenance, provided that, if a male, he is either a child and poor, or, if adult, that he is infirm or blind and poor, and if a female, that she is poor whether a child or adult. The liability of a person to maintain these relatives is in proportion to his share in their inheritance, not (of course) his actual share, for no one can have any share in the inheritance of another till after his death, but his capacity to inherit.[1] And this rule is applicable only among persons who are equal in respect of propinquity.[2] No adult male, if in health, is entitled to maintenance though he is poor; but a person is obliged to maintain his adult female relatives though in health of body, if they require it. The maintenance of a mere relative is not incumbent on any poor person; contrary to the maintenance of a wife and child,[3] for whom poor and rich are equally liable. All persons not themselves poor are obliged to maintain their poor relatives within the prohibited degrees.

No one shares with a husband the obligation of maintaining his wife, as already observed. So that if a woman should have a poor husband, and a son by another husband, or a father or a brother, in easy circumstances, the husband, and not the son, father, or brother, is liable for her maintenance. These, however, when in easy circumstances, may be ordered to maintain her, and to have recourse against her husband when able for the amount expended. Husband alone liable for the maintenance of his wife.

When a poor person has a father and a son's son, both in easy circumstances, the father is liable for his maintenance; and when there is a daughter and a son's son, the daughter only is liable, though they both divide the inheritance between them.[4] So also, when there is a daughter's daughter, or daughter's son, and a full brother, the child of the daughter, whether male or female, is liable, though the brother is entitled to the inheritance. When a person has a parent and a child, both in easy circumstances, the latter Among relatives within the prohibited degrees the liability for maintenance is regulated —1st, by propinquity;

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[1] *Doorr ool Mookhtar*, p. 293. [2] *Ibid.*, p. 292.

[3] *Hidayah*, vol. ii., p. 392.

[4] On the principle of the nearer being first liable.

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is liable, though both are equally near to him.[1] But if he have a grandfather and a son's son, they are liable for his maintenance in proportion to their shares in the inheritance, that is, the grandfather for a sixth, and the son's son for the remainder. If a poor person has a Christian son and a *Mooslim* brother, both in easy circumstances, the son is liable for the maintenance though the brother would take the inheritance.[2] If he has a mother and grandfather, they are both liable in proportion to their shares as heirs, that is, the mother in one third, and the grandfather in two thirds. So also, when with the mother there is a full brother, or the son of a full brother, or a full paternal uncle, or any other of the *âsubah* or residuaries, the maintenance is on them by thirds according to the rules of inheritance. When there is a full maternal uncle and the son of a full paternal uncle, the liability for maintenance is on the former, though the latter would have the inheritance; because the condition of liability is wanting in the latter, who is not within the forbidden degrees. Whenever there is kindred without prohibition, as in the case of the paternal uncle's son, or prohibition without kindred as in the case of a brother or sister by fosterage, or kindred and prohibition, but the prohibition not arising out of kinship, as in the case of an uncle's son who is also a brother by fosterage, there is no liability for maintenance.

2nd, by inheritance.

If a man have a paternal uncle and aunt, and a maternal aunt, his maintenance is on the uncle; and if the uncle be in straitened circumstances it is on both the others. The principle in this case is, that when a person who takes the whole of the inheritance is in straitened circumstances, his inability is the same as death, and being as it were dead, the maintenance is cast on the remaining relatives in the same proportions as they would be entitled to in the inheritance of the person to be maintained, if the other were not

Rule for regulating the liability of remoter relatives when the nearer is poor.

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[1] It is only for the maintenance of a young—that is, a minor—child that the father is first liable. Here the liability is cast on the child probably because better able to bear it than the father.

[2] The son being excluded by difference of religion.

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in existence; and that when one who takes only a part of the inheritance is in straitened circumstances, he is not to be treated as if he were dead, and the maintenance is cast on the others, according to the shares of the inheritance to which they would be entitled if they should succeed together with him. In further explanation of this principle, take the case of a poor person unable to earn anything, and having a son also poor and unable to earn anything, or an infant, and three brothers of different kinds. In these circumstances, the maintenance of the father is on his full brother, and his half brother by the mother, in sixths, that is, one sixth on the latter, and five sixths on the former, and the maintenance of the child is on the former alone.[1] If, instead of brothers, the man has three sisters of different kinds, they are liable for his maintenance in fifths, that is, the full sister for three fifths of it, the half sister on the father's side for one fifth, and the half sister on the mother's side for the remaining fifth, according to their respective shares in his inheritance; and the maintenance of the son is on his full paternal aunt alone. If we now suppose that, instead of a son, there is a daughter, and all the other circumstances are the same, the maintenance of the father in the case of brothers of different kinds is on his full brother, and in the case of sisters of different kinds on his full sister;[2] and the maintenance of the daughter in

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[1] The child, as sole heir of his father, is alone liable for his maintenance, but, being treated as if he were non-existent, the liability passes to the full brother, and the half-brother by the mother, who. in that event would be the heirs; and the father, as sole heir to the child, is alone liable for his maintenance, but, being treated as if he were non-existent, the liability passes to the father's full brother, who, as full paternal uncle to the child, would be his *ásubut* or residuary, and alone entitled to his inheritance.

[2] In both these cases the daughter takes a half, the full brother being entitled to the other half as residuary, and the full sister being entitled to it as residuary with the daughter. The daughter, therefore, is only a partner in the liability, and as, in such circumstances, she is not treated as non-existent, the whole liability passes to the others who would be joint heirs with her.

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like manner is on the full paternal uncle or paternal aunt.[1]

Difference of religion prevents a right to maintenance except in the case of wife, parents, and child.

Maintenance is not due where there is a difference of religion, except to a wife, both parents, grandfathers, and grandmothers, a child, and the child of a child. And a Christian is not liable for the maintenance of his *Mooslim* brother, nor a *Mooslim* liable for the maintenance of his Christian brother. Neither a *Mooslim* nor *zimmee* can be compelled to maintain his parents who are *hurbees*, or aliens, though they should be living as *moostamins* or under protection within the Mussulman territory; and, in like manner, a *hurbee* who has come into 'our' territory under protection cannot be compelled to maintain his *Mooslim* or *zimmee* parents.

Zimmees are liable for maintenance among themselves, notwithstanding a difference of religion.

Zimmees among themselves are, in the matter of maintenance, like *Mooslims*, even though they should be of different religions. When a *zimmee* has embraced the faith, and his wife, not being a *kitabeeah*, refuses *Islam*, and a separation is consequently made between them, she has no right to maintenance during the *iddut*; but when the wife embraces the faith, and the husband rejects it, and a separation takes place in consequence, she is entitled to both maintenance and lodging during the continuance of the *iddut*. When a *zimmee* has married a relative within the prohibited degrees, and this is allowed by his religion, and the wife claims from him the maintenance of a wife, it should be decreed to her, according to the analogy of Aboo Huneefa's opinion; and all are agreed that in the case of a marriage without witnesses, the wife is entitled to maintenance.

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[1] The father here would be sole heir to his daughter, and therefore alone liable for her maintenance. He is accordingly treated as non-existent, and the liability passes to the person who in that event would be the next heir.

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CHAPTER IV.

OF THE MAINTENANCE OF SLAVES.

A MAN is obliged to maintain his male and female slaves, whether they are absolute slaves, *moodubburs*, or *oom-i-wuluds*, and whether young or old, infirm or in health, blind or seeing, pledged or let to hire. If a master should refuse to maintain his slaves, those of them who are qualified should be let out to hire, and supported out of their wages; and those of them who for some reason are not qualified, as for instance by tenderness of years, or the like, the master should be ordered to maintain, with the alternative of selling them, if any are absolute slaves. But if they are *moodubburs* or *oom-i-wuluds*, and cannot therefore be sold, he may be compelled to maintain them. When a female is of a description that is not usually let out to hire—being beautiful, and therefore likely to excite contention—the master should be compelled either to maintain or sell her. When the gains of a slave are not sufficient for his or her maintenance, the deficiency must be supplied by the master, and the surplus, if any, belongs to him.

A master is obliged to maintain his slaves.

The proper quantity of a slave's maintenance is a sufficiency of the ordinary food of the city, with its condiments. The same rule is applicable to clothes, which it is unlawful to limit to the mere covering of the loins. When the master supplies the slave with food, condiments, and clothes it is not necessary that they should be committed to the slave himself. But when a master has several slaves, he should be equal in his treatment of them in respect of food, condiments, and clothes; and in like manner with regard

Quantity and quality of the food.

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to his female slaves. And when a slave objects to the quality of his food, and brings it to his master, the master should make him sit down to eat with himself; and if the slave should decline to do so out of respect for his master, the master should help him out of his own dish; but seating the slave by himself is better, as conducive to humility and generosity of disposition. Female slaves kept for pleasure may be dressed better than others from a regard to custom. It is incumbent on a master to buy water for the purification of his slaves. He is not obliged to maintain his *mookatub*, or a partially emancipated slave.

Slave's remedy when the master fails to maintain him.

When a man has a slave whom he does not maintain, and the slave is able to earn something for himself, he is not at liberty to eat of his master's food without his consent; but if he is weak, he may do so. If the slave is able, but the master forbids him, to earn for himself, the slave may say to his master, 'Either permit me to earn for myself, or maintain me;' and if the master should refuse to do either, the slave may then help himself out of his master's property.

Who, among several persons having interests in a slave, is bound to maintain him.

The maintenance of a slave who has been sold is on the seller while the slave remains in his possession, that of a deposited slave is on the depositor, and that of one who is borrowed on the borrower. A slave who is bequeathed in property to one person while his service is bequeathed to another, must be maintained by the latter, because he has the benefit of his services. But if the slave is too young for service, the owner is obliged to maintain him till he is able to work, when the obligation is transferred to the person who has the benefit of his service. If the slave should fall sick, and his sickness be such as to disable him for work, his maintenance is cast on his owner. But if, notwithstanding his sickness, he is still able for service, he must be maintained by the person who has the benefit of it. When a female slave is bequeathed to one person, and the child of which she is pregnant to another, the former must maintain her. The maintenance of a slave who is the property of two persons is obligatory on both in proportion

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to their shares. Yet if one of them in the absence of the other supply the whole of the maintenance, without the permission of the judge, his doing so is a voluntary act on his part, and he has no right of recourse against his co-partner.

Maintenance of emancipated slaves.

When a man has emancipated a little slave, whether male or female, the maintenance of the slave is not on the emancipator, but on the *beit-ool-mal*, or public treasury, when the child has no property of his own; and, in like manner the maintenance of the aged, infirm, and diseased, is on the public treasury when they have no property nor near relations of their own. When an emancipated slave is adult and in health, he must maintain himself by his own earnings.

Treatment of the lower animals.

When a man is the proprietor of a beast of burden, it is incumbent on him to supply it with food and water. But he cannot be compelled to do so, nor to sell it, though he may be enjoined, as a matter of conscience, to feed the animal or to sell it. It is abominable to overmilk a beast when it would be injurious from a deficiency in the supply of its food; it is also abominable to neglect milking it altogether. It is also proper to pare the animal's hoofs, and to avoid taking more of its milk than the surplus after its young has had enough while the young is unable to feed by itself. It is also abominable to overload an animal or prolong its travel beyond its strength, and the like. When a beast is the property of two persons, one of whom refuses to maintain it and the other applies to the judge for an order to do so, that he may not be a voluntary in the matter, the judge should order the recusant either to sell his share in the animal or to contribute to its maintenance. When a man has bees he should leave some part of the honey in their hives, and the quantity left should be greater in winter than during the rest of the year; but if he supplies them with other food, it is not necessary that he should leave them any of the honey.

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BOOK VII.

OF SHOOFÂ, OR PRE-EMPTION.[1]

CHAPTER I.

DEFINITION, CONDITIONS, QUALITY, LEGAL EFFECT, AND SUBJECTS OF PRE-EMPTION.

Definition.

THE original meaning of *shoofâ* is conjunction.[2] In law it is a right to take possession of a purchased parcel of land,[3] for a similar (in kind and quantity) of the price[4] that has been set on it to the purchaser. The cause of it is the junction of the property of the *shufee*, or person claiming the right, with the subject of purchase.[5]

Conditions.

Among its conditions are the following:—1st. There must be a contract of exchange, that is, a sale or something that comes into the place of a sale, otherwise there is no right of pre-emption. So that the right does not arise out of gift, charity, inheritance, or bequest. But if the gift be a *heba-ba-shurt-ool-iwuz*, or with a condition that something shall be given in exchange for it, and mutual possession is taken, the right arises. If possession is taken by one of the parties, and not by the other, there

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[1] *Fut. Al.*, vol. v., p. 249. [2] *Doorr ool Mookhtar*, p. 697.

[3] *Bukût*, terræ angulus (Freytag). In the Moontuha ul Urub, it is rendered by the Persian words *parah-zum een*, a piece or fragment of land.

[4] See *post*, p. 494. [5] *Doorr ool Mookhtar*, p. 20.

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is no right of pre-emption according to 'our three masters. And if a mansion is given without any condition for an exchange, but the donee gives another mansion in exchange for it, there is no right of pre-emption with regard to either. But pre-emption is due on a mansion which is the exchange for a composition, whether the composition be after an acknowledgment or a denial of the claim, or silence has been observed with regard to it; and it is also due on the mansion compounded for, when the composition is after an acknowledgment of the claim, though it is not due if the composition have taken place after a denial of the claim. 2nd. There must be an exchange of property for property.[1] So that if one should emancipate a slave in exchange for a mansion, there is no right of pre-emption. 3rd. The thing sold must be *âkár*,[2] or what comes within the meaning of it, whether the *âkár* be divisible, or indivisible, as a bath, or well, or a small house, or a mill, or road.[3] 4th. There must be a cessation of the seller's ownership in the subject of sale; and when this is not the case, as, for instance, when an option has been stipulated for to the seller, there is no pre-emption; but then, when the option drops, the right of pre-emption arises. It is also due when the option is to the purchaser. But not so when it is to both seller and purchaser. And if the seller should stipulate for an option to the *shufee*, he would have no right of pre-emption, whether he should allow or dissolve the sale. His device in such a case would be neither to allow nor dissolve the sale till it had become final by expiration of the time of option, when his right of pre-emption would become effective. The options of inspection and defect do not prevent the

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[1] This is the definition of sale.

[2] The strict meaning of the word is 'a space covered with buildings,' so that properly speaking the term is not applicable to a *zuyut*. *Fut. Al.*, vol. iii., p. 605. But according to the *Kifayah*, (vol. iv., p. 940) and the *Inayah* (vol. iv., p. 263), *âkár*, in the sense in which it is liable to pre-emption, includes a *zuyut*. According to Freytag, *zuyut* is a field, whether arable or pasture.

[3] *Kifayah*, vol. iv., p. 940.

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right of pre-emption. 5th. There must also be an entire cessation of all right on the part of the seller. There is therefore no right of pre-emption for an invalid sale. But if the purchaser under an invalid sale should sell by a valid sale, the pre-emptor has an option, and may take the mansion on the first or the second sale. If he takes it on the second, it is at the price; but if he takes it on the first, it is at the value of the day when possession was taken; for a thing sold by an invalid sale is on the purchaser's responsibility when possession is taken of it, in the same way as a thing usurped. 6th. There must be *milk* or ownership of the *shufee*, or pre-emptor, at the time of the purchase, in the mansion on account of which he claims the right of pre-emption. So that he has no right on account of a mansion of which he is merely the tenant for hire, or that he has sold before the purchase, or has converted into a *musjid*, or place of worship. And if his right of property in the mansion on which his claim of pre-emption is founded is disputed by the purchaser, he must prove his title to it before he can take possession of that to which his claim of pre-emption is applied. 7th. It is required that there shall be no acquiescence by the *shufee* or pre-emptor, in the sale or its effect, either expressly or by implication; as for instance, by his having been employed by the vendor to negotiate the sale, and having done so accordingly, when he could have no right of pre-emption.

Islam is not a condition.

Islam on the part of the pre-emptor is not a condition. So that *Zimmees* are entitled to exercise the right of pre-emption as between themselves or against *Mooslims*. Neither are manhood, puberty, and justice, or respectability of character, conditions of its exercise.

Quality.

The quality of *shoofâ* is that the taking of a place or property under a right of pre-emption comes into the place of a purchase *ab initio*. So that all that is established to a purchaser without stipulation, as the right to reject under the option of inspection, is equally established without it in favour of a pre-emptor, and whatever is not esta-

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blished to the former without stipulation, is not established to the latter without it.

Effect.

The effect of *shoofâ* is to legalize the demand of pre-emption on its cause being ascertained, its prosecution after demand, and the establishment of a right of property upon decree of the judge or consent of the purchaser.

The proper subjects of pre-emption.

'Our' masters have said that movables are not directly or by themselves[1] proper objects for the right of pre-emption, but that they are so as accessaries to *âkár*; and that *âkár*, such as mansions, vineyards, and other kinds of land,[2] are directly the objects of the right. There is no pre-emption in movables, because the Prophet has said, there is no *shoofâ* except in a *ruba* or mansion, and a *háit* or garden.[3] So that when the *imam* has taken possession of lands for the *beit-ool-mal* or public treasury, and has given them up in *moozaraut* to people who have built upon them, or planted trees in them, and have afterwards sold the buildings or trees; the sale of the lands being unlawful, there is no right of pre-emption in the buildings and trees. When it is said that *âkár* are proper objects of the right of pre-emption, it is by virtue of a right of *milk* or ownership, that they are so. Hence, if a mansion were sold by the side of a *wukf*, the appropriator would have no right of pre-emption;[4] nor could the *mootuwulee*, or superintendent, take it under that right. And though a mansion were appropriated for the benefit of a private individual, he could found no right of pre-emption on account of it. If a person should buy a house,

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[1] *Muksoodun*, literally *designedly*.

[2] Literally, 'and the rest from among lands.'

[3] *Hidayah*, and *Kifayah*, vol. iv., p. 940. *Háit* means properly a wall, or that which surrounds, though applied elliptically to the enclosure (Freytag). Comparing this with note 3, p. 475, and note 2, p. 476, it would seem that the right of *shoofâ* is, strictly speaking, applicable only to houses and small enclosures of land. It has been held, however, to extend to a whole *mouza* or village.—*S. D. A. Calcutta*; *Reports*, vol. iii., p. 85.

[4] Because he is not the proprietor.

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but not take possession of it till another mansion by the side of it is sold, he still has the right of pre-emption. When a mansion is given to a woman as her dower, or is given in exchange for emancipation, it is not subject to the right of pre-emption. But if a man should marry a woman without specifying any dower, and should then sell her a mansion in exchange for her proper dower, the mansion would be liable. Or if he should marry her for a specified dower, and then sell her a mansion in exchange for that dower, the mansion would be equally liable. So, also, if he should marry her without any specification of dower, and dower is subsequently assigned to her by the judge, and a mansion is sold to her in exchange for that dower, such mansion is liable. A man marries a woman without mentioning any dower, and then gives her a mansion. If, in so doing, he says, 'I have given it as thy dower,' there is no pre-emption. But if he says, 'I have given it in exchange for thy dower,' the mansion is liable to it.[1] When a man gives a mansion to another on condition that he shall release him from a debt that he owes to him, the *shufee* of the mansion has his right of pre-emption.

No right of pre-emption in a case of partition of partnership property nor in an invalid sale.

When a partition is made by partners of immovable property, the neighbour has no right of pre-emption, whether the partition be made by decree of a judge or without such decree. Nor is there any right of pre-emption in the case of an invalid sale, whether the purchaser has taken possession or not; but this only when the sale is invalid from the beginning; for if after it had been validly contracted it should subsequently become invalid, the right of pre-emption remains. If a man should bequeath his mansion to one person, and the usufruct of it to another, and another mansion by the side of it is sold, the legatee of the first mansion (not of its usufruct) has the right of pre-emption.

No pre-emption in trees or

When a person has purchased a palm-tree to cut it down, or when he has purchased it absolutely, there is no

[1] Sale may be effected by the word 'give.'

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buildings purchased with a view to removal.

right of pre-emption in it. But if it be purchased with its roots and the ground on which it stands, it is liable to the right. The rule is the same with regard to buildings purchased for removal, and the same buildings purchased with their foundations; and there is no pre-emption in the former case, while there is in the latter.

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CHAPTER II.

OF DEGREES IN THE RIGHT OF PRE-EMPTION, WHEN SEVERAL PERSONS ARE ENTITLED TO IT.

The persons entitled to pre-emption are, 1st, a partner in the substance; 2nd, a partner in a right; and 3rd, a neighbour.

A *shureek* (or partner in the substance of a thing) is preferred to a *khuleet* (or partner in its rights, as of water, or way [1]), and a *khuleet* is preferred to a neighbour. If the *shureek* gives up his right, the *khuleet* is entitled; and among *khuleets* the special is preferred to the general.[2] If the *khuleet* gives up his right, the neighbour is entitled. This is the answer of the Zahir Rewayut, and it is correct. To illustrate what has been said, take the case of a mansion which is situate in a street without a thoroughfare, and belongs to two persons, one of whom sells his share. The right of pre-emption belongs, in the first place, to the other partner in the mansion. If he surrenders his right, it belongs to the inhabitants of the street equally, without any distinction between those who are contiguous and those who are not so; for they are all *khuleets* in the way. If they all surrender the right, it belongs to a *moolasik*, or contiguous neighbour.[3] If there be another street leading from this street, and having no thoroughfare, and a house in it is sold, the right of pre-emption belongs to the inhabitants of this inner street, because they are more specially

Illustration.

[1] The explanations within parentheses are from the *Hidayah*, vol iv., p. 1 (413). *Khuleet* means, literally, 'mixed with.' Though rights of water and way are given as examples, it does not appear that a *khuleet* in any other right than these has the right of pre-emption.

[2] This holds also among *shureeks*, as will be seen a little farther on.

[3] The exact meaning is given a little farther on.

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intermixed with it than the people of the other street. But if a house in the outer street be sold, the right of pre-emption belongs to the people of the inner as well as to those of the outer street, for the intermixture of both in the right of way is equal. If the street were open, with a passage through, and a mansion in it were sold, there would be no right of pre-emption except for the adjoining neighbour. In like manner, when there is a thoroughfare, which is not private property, between two mansions (that is, when they are situate on opposite sides of the way), and one of them is sold, there is no pre-emption, except for the adjoining neighbour. If the road be private property, it is the same as if it were no thoroughfare. A thoroughfare which does not give the right of pre-emption is a street that the people residing in it have no right to shut. In like manner as to a *nuhr* or stream from which several lands or several vineyards are watered, and some of the lands, or some of the vineyards, watered by it are sold:—all the partners are pre-emptors, without any distinction between those who are and those who are not adjoining. But if the channel be large, the right of pre-emption belongs to the adjoining neighbour. There is some difference of opinion as to the distinction between a small and a large channel—Aboo Huneefa and Moohummud saying that when boats can pass through a channel it is large, and when boats cannot pass through, it is small. Sheibanee has said that in this place, by boats, *shoomarees* are to be understood, which are small boats. And if from this channel another channel is led, upon which there are lands, and gardens, and vineyards, and a piece of land or garden is sold which is watered from this channel, the people of this channel have a preference over those of the greater channel. But if land on the greater channel be sold, the people on both channels are equally entitled to the right of pre-emption, as they all derive their water from it.

A special is preferred to a

Within a mansion, which is situate in a street without a thoroughfare, and which has several owners, there is a house belonging to two persons, and one of them sells his share in

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it. The right of pre-emption belongs first to the partner [1] in the house, then to the partners in the mansion, and next to the people in the street, who are all alike. If all these give up their right it belongs to the *moolasik*, or adjoining neighbour, by whom is meant the neighbour behind the mansion, whose mansion has a door opening into another street.

general partner;

A mansion belonging to two persons is situate in a street which has no thoroughfare, and one of the partners sells his share to a stranger: the right of pre-emption belongs first to the partner in the mansion, then to the partner in a party wall, then to all the people in the street equally, and then to the neighbour in the mansion behind that which is sold, and the door of whose mansion opens from another street.

An adjoining neighbour from behind postponed to a partner in the way:

According to Khusaf, the neighbour who is postponed to a partner in the right of way is one who is not co-owner of the land on which a party-wall stands, and when the neighbour is such a partner he is not to be postponed, but rather to be preferred to a partner in the way. To explain this, suppose that a piece of land belongs to two persons, and that they erect a wall in the midst of it, and then make a partition as to all the rest of the land, so that the wall and the ground on which it stands remains in the joint ownership, the neighbour in such a case is a partner in a part of the thing sold. But when they divide the land, drawing a line in the midst of it, and then each of them gives something out of his own part, and they erect a wall upon this (that is, on the two slips), each is neighbour to his fellow in the land upon which the wall stands and a partner in the wall, but in nothing besides, and partnership in the wall, that is, in the mere building, does not confer a

Unless he is a partner in the land on which a party wall stands.

[1] Who is a partner in land may sometimes be a question of some difficulty in some parts of India. According to the opinion of the law officer in a case cited at p. 193 of the *P. P. M. L.*, the Zumeendar, who receives *malikanah*, or proprietary tithe, is a partner in *aymah* land, situate within the village, and is entitled to the right of pre-emption in such land. Much more then it would seem is he entitled to it in mere *ryoty* land, where he receives the full rent.

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right of pre-emption. Koodooree has reported that a partner in the land on which a party wall stands is entitled to pre-emption in the whole of the thing sold by reason of the partnership, according to Moohummud and one report of Aboo Yoosuf, and is preferred as to the whole to a neighbour.

According to Moohummud, in every case where a partner resigns his right to pre-emption and the neighbour becomes entitled, it is necessary that the neighbour should have made his claim on hearing of the sale; for if he wait till the waiver of his prior right by the partner, the neighbour has no claim.

Miscellaneous cases.

When the owner of a large mansion in which there are several houses, sells one of them, or sells any other known part of the mansion, the right of pre-emption belongs to the neighbour of the mansion, on whichever side he may be. But if the pre-emptor gives up his right, and the purchaser afterwards sells the house, or the particular part, the right of pre-emption belongs only to the neighbour of the house or part which has now become a separate or independent property, and is no longer deemed to be a part of the mansion. The lower part of a house belongs to two persons, one of whom owns the upper part jointly with a third party, and sells his shares in both the lower and the upper parts of the house:—the partner in the lower has the right of pre-emption with regard to the share in it, and the partner in the upper has the right of pre-emption with regard to the share in it; and the partner in the lower has no right of pre-emption in the upper, nor the partner in the upper any right of pre-emption in the lower; for the partner in the lower is only a neighbour to the upper, or a sharer in its rights when the way to the upper is through the lower, and the partner in the upper is only a neighbour to the lower, or a sharer in its rights when the way to the upper is through it; and a partner in the substance is entitled to the preference. If a person have the upper floor of a mansion with a way to it through the mansion, the rest of the mansion being the property of another person, and the owner of the upper floor sells it with its

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right of way, the right of pre-emption belongs, on a favourable construction, to the owner of the lower floor; but if the way to the upper floor be through the mansion of a third party, the owner of the mansion in which the way lies has a preferable right to the pre-emption of the upper floor. A mansion belongs to two persons, one of whom has also a right in a party wall between it and another mansion belonging to him and a third party, the partner in the first mansion, who is also part owner of the wall, sells his share in the mansion and the wall: the partner in the mansion has the better right to the pre-emption of the mansion, and the partner in the wall the better right to the pre-emption of the wall. And so also in the case of a mansion between two persons, one of whom has a wall in a mansion belonging to him and a third party, and sells his share in the mansion and the wall, the partner in the mansion has the preference with regard to the mansion, and the partner in the wall the preference with regard to the wall. In one mansion there are three houses in a row; first one, then by its side another, and then a third, all belonging to different owners, and the owner of one sells his house. If there is a common way within the mansion to all the houses, the right of pre-emption belongs to the remaining owners by reason of partnership in the way; but if the doors of the houses be in an open thoroughfare not in the mansion, and the middle house is sold, the pre-emption belongs to the first and the third, while if the first or third be sold, it belongs to the owner of the middle house. A man has a mansion in which there is a house belonging to him and another, and he sells the mansion, whereupon a neighbour claims pre-emption, and it is also claimed by the partner in the house. The latter is to be preferred as to the house, but with regard to the rest of the mansion, they are entitled equally. And it is reported from Aboo Yoosuf that when a person purchases a wall with the ground on which it stands, and then purchases what remains of the mansion, whereupon the neighbour of the wall claims pre-emption, he is entitled to it only with regard to the wall and not as to the remainder of the mansion.

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A partner in a right of way is preferred to a partner in a *shirb* or right of water.

The owner in a way is preferred for pre-emption to the owner of a *nusseel*, or channel of water, when the place of the channel is not his property; so that if a mansion is sold in which one person has a way, and another a channel of water, the former has the right of pre-emption rather than the latter.

So also a share owner in a stream of water has a better right of pre-emption than the owner of the land through which it flows; unless the ownership is to a different part of the stream.

A person who has a share in a stream of water has a better right to pre-emption than the person through whose land the water flows. But when the upper part of a stream belongs to one person, the lower part of it to another, and it flows through the land of a third, and the share of the owner of the upper part is purchased, the right of pre-emption belongs to both the owner of the lower part and the owner of the land, on the ground of neighbourhood. So, also, if one should purchase the share of the owner of the lower part of the stream, the owner of the upper part would have the right of pre-emption on the ground of neighbourhood.[1]

[1] It would seem from the 'so also,' with which the last sentence begins, that the owner of the land would have a joint right of pre-emption, as in the case of the sale of the upper part.

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CHAPTER III.

OF THE DEMAND OF PRE-EMPTION.

Three kinds or stages of demand.

THE right of pre-emption is founded on contract and neighbourhood, is confirmed by *tulub*, or demand, and *ish,had*, or invocation, and is perfected by taking possession. The demand is of three kinds: *tulub-moowathubut*,[1] or immediate demand; *tulub-tukreer*, or confirmatory demand, also styled *tulub-ish,had*, or demand with invocation; and *tulub-tumleek*, or demand of possession, also styled *tulub-khusoomut*, or demand by litigation.[2]

Immediate demand.

By *tulub-moowathubut* is meant, that when a person who is entitled to pre-emption has heard of a sale, he ought to claim his right immediately on the instant (whether there is anyone by him or not),[3] and when he remains silent without claiming the right, it is lost. This is the report of the Asul, and it is *mushhoor*, or notorious, among 'our' sect; though there is another report as from Moohummud, that demand at any time during the meeting at which the information received is sufficient. According to the *Hidayah*, if a pre-emptor receives the information of a sale by letter, and the information is contained in the beginning or middle of the letter, and he reads on to the end without making his claim, the right is lost.[4] There is some difference as to the words in which the demand should be expressed; but the correct opinion is that it is lawful in any words that intelligibly

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[1] The word means, literally, 'jumping up.'
[2] Hidayah, vol. iv., p. 924.
[3] Inayah, vol. iv., p. 249.
[4] Vol. iv., p. 922.

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express the demand. So that if he should say, 'I have demanded,' or 'do demand pre-emption,' it would be lawful. But if he were to say to the purchaser, 'I am thy *shufee*, or pre-emptor,' or 'I take the mansion by pre-emption,' it would be void. The proper time for making the demand of pre-emption in the case of an invalid sale is not that of the purchase, but when the seller's right is entirely cut off.[1] And with regard to a gift *ba-shurt-ool-iwuz*, or with a condition for an exchange, there are two reports, by one of which regard is to be had to the time of mutual possession, and by the other to the time of the contract.[2] If a neighbour and a partner should hear of a sale at the same time, both being in one place, and the partner should make the demand, but the neighbour remain silent, and the partner should then waive his right, the neighbour could not take it up.[3] When a mansion is sold in which two persons have a right of pre-emption, and one of them is absent but the other present, and the one who is present claims half the mansion under his right of pre-emption, the right is annulled. So also if both were present, and each should claim a right of pre-emption as to half, the right of both would be annulled.

Difference of opinion as to a pre-emptor being obliged to act on information that has not the quality of ordinary testimony.

Knowledge of a sale is sometimes obtained by the pre-emptor himself hearing or being present at the contract, and sometimes by his receiving information of it from another. In the latter case, then, are number and justice of the informants a necessary condition, as in the case of witnesses? Upon this point there was a difference of opinion among 'our' masters, Aboo Huneefa saying that it is a condition that there should be one or other of these, that is, either number,—as of two men, or one man and two women,—or justice; while according to Aboo Yoosuf and Moohummud, neither number nor justice is required. So that if one person were to give information

[1] I suppose on possession being taken with the seller's permission, when the purchaser becomes the proprietor. See M.L.S., chap. xi.

[2] In the *Doorr-ool-Mookhtar* (p. 702), the time of mutual possession is stated absolutely without any notice of the different reports.

[3] See *ante*, p. 484.

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of a sale, and the person entitled to pre-emption should remain silent, the right would be annulled according to them if the information should prove to be true, whether the informant were just or unjust, free or a licensed slave, adult or under puberty. Kurukhee has said that this is the most correct of the reports (or opinions). Though the information should be given by only one unjust man, yet if the pre-emptor believes him, the sale is established, on his information according to them all; but if he disbelieves the informant, the sale is not established according to Aboo Huneefa, though the information should prove to be true; while according to the others, it is established in that case.

Demand with invocation:

By *tulub-ish,had*, or demand with invocation of witnesses (also styled *tukreer*, as before mentioned), is meant a person calling on witnesses to attest his *tulub-moowathubut*, or immediate demand. The invocation of witnesses is not required to give validity to that demand, but only in order that the pre-emptor may be provided with proof, in case the purchaser should deny the demand, saying, 'You did not demand your right when you heard of the sale, nay, you abandoned your right and rose from the meeting;' while the pre-emptor says, on the other hand, 'I did demand it,' when, the word being with the purchaser, the *onus probandi* would be cast on the other. To give validity to the *tulub-ish,had*, it is required that it be made in the presence of the purchaser, or seller, or of the premises which are the subject of sale. And the person claiming the right of pre-emption should say, in the presence of one or other of these, 'Such an one has purchased this mansion,' or 'a mansion (specifying its own boundaries), and I am its *shufee* and have demanded the pre-emption, and now do demand it: bear ye witness to this.' The making of this demand is measured by the ability to do so. And when one is able to make the demand in the presence of one or other of these (though only by letter or a messenger[1]), and fails to do so, the

[1] *Doorr-ool-Mookhtar*, p. 699.

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right of pre-emption is annulled, to prevent injury to the purchaser. If he leave the nearest to go to one more remote, all being in the same city, the right is not annulled on a favourable construction; otherwise, if the more remote be in another city, or in one of the villages belonging to the same city. But if they are all actually in one place, and the demand is made at the more remote, abandoning the nearer, it is still lawful; unless, indeed, he has arrived at the nearer, and then gone on to the more remote, in which case the right would be cancelled. If possession has not been taken of the things sold, the pre-emptor has an option, and may, if he please, make the demand in the presence of the seller or of the premises; or he may make it in the presence of the purchaser, though he is not in possession, because he is the actual proprietor.[1] But if possession has been taken by the purchaser, Kurukhee has said that it is not valid to take witnesses to the demand in the presence of the seller. Moohummud, however, has expressly said in the Jama Kubeer that it is lawful after delivery to the purchaser, on a liberal construction, though not by analogy. When a pre-emptor receives intelligence of a sale during the night, and is unable to go out and call upon witnesses to attest his demand, but does so as soon as it is morning, the demand is valid. But he should go out and make his demand in the morning as soon as people are stirring about their usual avocations.

is not required when witnesses have been invoked to the first demand.

The *tulub-moowathubut*, or immediate demand, is first necessary; then the *tulub-ish,had*, or demand with invocation, if, at the time of making the former, there was no opportunity of invoking witnesses, as, for instance, when the pre-emptor, at the time of hearing of the sale, was absent from the seller, the purchaser, and the premises. But if he heard it in the presence of any of these, and had called on witnesses to attest the immediate demand, it would suffice for both demands, and there would be no necessity for the other.

Demand of possession.

By the *tulub-tumleek*, or demand of possession, is meant

[1] The last clause is from the *Doorr-ool-Mookhtar*, p. 690.

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the bringing the matter before the judge that he may decree the property to the claimant by virtue of his right of pre-emption. If he neglects to litigate the matter for a sufficient reason, such as sickness, imprisonment, or the like, and cannot appoint an agent, the right of pre-emption is not annulled. And though he should neglect to do so without a sufficient reason, the right would not be annulled, according to Aboo Huneefa, and Aboo Yoosuf also, by one report. And this is the manifest doctrine of the sect, the *futwa* being in accordance with it. But according to Moohummud, and Zoofr, and Aboo Yoosuf, also, by another report, if he should call witnesses to his demand, yet should neglect to sue for a month without a sufficient excuse, the right of pre-emption is annulled, and decisions are also given according to this opinion. The proper form for making the demand of possession is, for the pre-emptor to say to the judge, 'Such an one has purchased a mansion' (describing its situation and boundaries), 'and I am the *shufee* by reason of a mansion belonging to me' (the boundaries of which he should also explain). 'Order him, therefore, to deliver it up to me.' But even after this demand, the mansion does not become established as his property without an order by the judge for its delivery to him, or actual delivery by the purchaser himself. So that if before either of these take place another mansion by the side of this mansion is sold, and the judge then passes his order, or delivery is made by the purchaser, the pre-emptor has no right of pre-emption in this other mansion. In like manner, if the pre-emptor should die or sell his own mansion after both the demands, but before the judge's order or delivery by the purchaser, the right of pre-emption would be void. And the *shufee* may refuse to take the mansion, though the purchaser should be willing to make delivery, until the judge has decreed it in his favour. If the mansion be in the possession of the seller, it is a condition to the hearing of the suit that both the seller and purchaser be present; because the pre-emptor is suing for both right and possession, the former being in the purchaser and the latter in the seller. But if the mansion be in the possession

Form of the application.

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of the purchaser, his presence alone is sufficient for the hearing of the cause.

How the judge is to proceed on the application being made to him.

When the *shufee* brings his suit claiming his right of pre-emption, the judge is first to ask him, before accepting or admitting his suit against the defendant, respecting the town and *muhullah*, or sub-district, in which the mansion is situate, and its boundaries, for he is seeking to establish a right in it, and it is necessary that it be known, since a suit for what is unknown is invalid. When this has been explained, he is then to ask him whether the purchaser has taken possession or not; for when he has not taken possession the suit is not valid against him until the seller appears. When this has been explained he is to ask him the cause of his right of pre-emption, and the boundaries of the property by reason of which he founds his claim; for there are different causes of this right, and he may perhaps be suing for one that is invalid, or he may be excluded by a person who has a preferable right. When he has assigned a valid cause, and is not excluded by any other person, the judge is then to ask him when he became acquainted with the sale, and how he acted on the occasion; for the right may be annulled by length of time or by some other objection, and this should be unfolded. When this has been explained he is to ask him about the *tulub tukreer*, or confirmatory demand, how it was, and before whom he made the demand, and whether he was nearer or more remote than another in the manner already mentioned. When all this has been explained, and no condition is wanting, the suit is complete and to be accepted or admitted as against the defendant, who is then to be asked respecting the mansion on which the claim of pre-emption is founded, 'Is it the property of the pre-emptor or not?' even though it were in his possession, and possession is apparent evidence of right; for apparent evidence is not sufficient, and the right must be established by proof as the basis of the right of pre-emption. The defendant is accordingly to be asked regarding it, and if he denies the property the judge is to say to the plaintiff, 'Produce proof that it is thy property,' and if he fail to do so, and demands the oath of the pur-

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chaser, the oath is to be put in these words, 'By God, you do not know that he is the proprietor of this on which he grounds his claim of pre-emption.' If the purchaser refuses the oath, or the pre-emptor produces proof, or the purchaser acknowledges the right, the pre-emptor's title is established to the mansion on which he founds his claim; and after this the judge is to ask the purchaser, saying, 'Have you purchased or not?' If he deny the purchase, the judge is then to say to the claimant, 'Produce proof that he has purchased,' and if he is unable to do so, and demands the oath of the purchaser, the oath is to be put to him in these words, "By God, I have not purchased,' or, 'By God, he has no right of pre-emption against me in this mansion as he has mentioned.' This would be putting the oath as to the result, which is in conformity with the opinion of Aboo Huneefa and Moohummud, while the other mode would be to put it as to the cause, which is agreeable to the opinion of Aboo Yoosuf. If he refuse the oath or acknowledge the purchase, or the pre-emptor adduces proof of it, decree is to be given in his favour, the right being made manifest by proof. With regard to the proof of the pre-emptor's being neighbour to the purchased property, it is required that the witnesses should testify that 'This mansion, which is in the vicinity of the purchased mansion, has been the property of this pre-emptor before this purchaser purchased this mansion, and that it is his up to this time; we do not know that it has gone out of his ownership.' But if they should say that 'This mansion is to this neighbour,' it would not be sufficient; though if they should say that 'The pre-emptor bought this mansion from such an one, and it is in his possession,' or that 'such an one gave it to him,' the testimony would be sufficient.

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CHAPTER IV.[1]

OF THE LEGAL PROSECUTION OF THE PRE-EMPTOR'S CLAIM AND ITS EFFECT WHEN ESTABLISHED.

The price need not be produced at the time of making the claim.

It is not incumbent on the pre-emptor to produce the price at the time of making his claim. Nay, he may lawfully contest the matter without producing the price during the sitting of the judge. But after the decree has been pronounced, he should then produce it. Though, if he should delay to deliver the price after he has been directed to deliver it, his right is not cancelled, without any difference of opinion.

How the price is to be determined to the pre-emptor.

When a person purchases, it must necessarily be for something that belongs to the class of similars, that is, things which are estimated by measures of capacity or weight, or are approximates of tale; or for something that belongs to the class of dissimilars, such as a piece of cloth, or a slave, or the like.[2] In the former case, the pre-emptor takes the subject of sale at a similar of the price, in the latter he takes it for its value, according to the general body of the learned. So that if one mansion were bought or exchanged for another, the *shufee* of each would have to pay its value, as mansions are not of the class of similars. And when a mansion is sold for a particular slave, the *shufee* takes it under his right for the value of the slave; and even though the slave should happen to die before possession is taken of him by the

[1] This chapter is properly a continuation of the last, though the first part of the next is placed between them in the original digest.

[2] See generally as to prices, *M. L. S.*, p. 19.

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seller (whereupon the sale is cancelled as between the seller and purchaser), the pre-emptor may still take the mansion for the value of the slave, according to 'us.' When a person has purchased a mansion for a slave whom he returns on account of a defect subsequently discovered in him, the pre-emptor must take the mansion at the value of a sound slave; for the slave enters into the contract with the quality of soundness, and stands with respect to the pre-emptor in the condition in which a right to him was acquired by the contract. If a slave were purchased for a mansion, that case and the purchase of a mansion for a slave are alike.[1]

Differences between the pre-emptor and purchaser as to the price.

When a purchaser and a pre-emptor differ as to matters of fact, the difference must have reference either to the price or the subject of the sale. When they relate to the price they must have respect to its kind, or quantity, or quality. When the difference is as to the kind of the price, as, for instance, when the purchaser says, 'I bought for a hundred *deenars*,' and the pre-emptor says, 'It was for a thousand *dirhems*,' the word of the purchaser is to be preferred, as he must obviously be better acquainted with the price than the pre-emptor. When the difference is as to the amount or the price, the word of the purchaser is also preferred, and if they both adduce proof, preference is given to that of the pre-emptor, according to Aboo Huneefa and Moohummud, though, according to Aboo Yoosuf, the proof of the purchaser should be preferred. When the purchaser asks a certain price, and the seller asks less, the price being still unpaid, the pre-emptor may take the subject of sale at the price put upon it by the seller. But if the seller asks more than the purchaser, they are both to be sworn; and if either refuses to swear, the price is to be taken as stated by the other, while, if they both take the oath, the sale is to be cancelled as between them, and the pre-emptor may take the subject of sale at the price stated by the seller. But if the price has been paid, the pre-emptor may take the subject of

[1] The last paragraph relating to prices is from Chap. xiii. p. 299.

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sale, if he please, at the price mentioned by the purchaser, without any regard to that mentioned by the seller. And if it is not clear whether the price has been paid down or not, but the seller says, 'I sold for a thousand, and have received the price,' the pre-emptor may still take the subject of sale at the thousand; while, if the seller should say, 'I have received the price, and it is a thousand,' no regard is to be paid to what he says. When the difference is as to quality of the price, as when a person has purchased a mansion for chattels, and mutual possession is not taken till the chattels perish, which induces a cancellation of the sale as between the seller and purchaser, though the right of pre-emptor remains at the value of the chattels, and the seller and purchaser then differ as to their value, the word of the seller, with his oath, is to be preferred; but if either party produces proof, the proof is to be accepted; while if they both adduce it, preference is to be given to that of the seller. When the difference relates to the thing sold, it is whether the sale took place by one bargain or by two bargains, as, for instance, when a mansion has been purchased, and the purchaser says, 'I bought the site separately for a thousand,' and the pre-emptor says, 'Nay, but you bought them both for two thousand,' the word of the pre-emptor is preferred; but whichever of them adduces proof, his proof is to be accepted, and if they both adduce proof together, without specifying any time, the proof of the purchaser is to be preferred, according to Aboo Huneefa and Aboo Yoosuf, but that of the pre-emptor according to Moohummud.[1]

Difference as to the thing sold.

When the pre-emptor has taken the mansion from the purchaser, the contract with its responsibilities is on him; and when he takes it from the seller, the contract and its responsibilities are on the seller. When the judge has made a decree in favour of the pre-emptor, or the purchaser has made delivery, all the legal effects of sale are established between them, such as the options of inspection

The responsibilities of the contract are on the party from whom the pre-emption is claimed.

[1] The last paragraph relating to differences is from Chap. x., pp. 288, 289.

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and defect, and recourse for the price in the event of a right of property being established by a third party; except that a pre-emptor has no right of recourse for any loss sustained in consequence of the *ghuroor*, or deception. So that if he should erect buildings within a mansion obtained under his right of pre-emption, and a right is established to the mansion, and an order given for the demolition of the buildings, he can have recourse only for the price against the person from whom he took the mansion, under the right of pre-emption, and not for the value of the buildings, according to the most received report, though Aboo Yoosuf was of opinion that he can have recourse for their value, and that a purchaser can do so also.[1] And when the purchase has taken place for a deferred price, as, for instance, on credit for a year, the pre-emptor is not entitled to the benefit of the credit, except with the consent of the person from whom he takes the subject of sale; and when that person is not content, the judge should say to the pre-emptor, 'Pay down the price at once, or have patience till the expiration of the credit. If he should pay it down, and the person from whom he is taking the subject of sale is the seller, the price drops as against the purchaser; but if that person be the purchaser, the credit remains as it was in favour of the latter, so that the seller has no power to demand it of him before the expiration of the term. If the pre-emptor have patience till the arrival of the time of payment, he is entitled to his right of pre-emption, provided the credit be known; but if it be unknown, as, for instance, 'till harvest,' or 'the treading out of the corn,' and the pre-emptor, should say, 'I will pay the price immediately and take the subject of sale,' he cannot do so.

But the pre-emptor is not entitled to compensation for improvements;

nor to any credit that may have been allowed to the purchaser.

[1] The report is confirmed by an extract from the *Tubyeen*, which states that neither the seller nor the purchaser is liable for the value of buildings or plants placed on the ground by the *shufee*, nor any loss incurred by their removal. *Fut. Al.*, vol. v., p. 305.

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CHAPTER V.

OF THE PRE-EMPTOR'S RIGHT TO THE WHOLE OR A PART OF THE PURCHASED PROPERTY.

Where several houses are purchased by one contract the pre-emptor may take one of them without the rest, if his right applies to that alone. But where only one is purchased, he cannot take a part of it.

WHEN one man purchases from one, by a single bargain, several *munzils*, or houses, in a street in which there is no thoroughfare, and the pre-emptor desires to take one of them, it has been said that if his right of pre-emption is based on partnership in the way, he cannot take a part of the purchased property, for this would be to divide the bargain without any necessity; but if the right be based on neighbourhood, and he is neighbour only to the house which he wishes to take, he may lawfully take it alone.

When a pre-emptor wishes to take one part of a purchased property without another, and the part is not distinct or separate, as, for instance, when the purchased property is a single mansion, and the pre-emptor desires to take that part of it which abuts on his own premises, without the remainder, he cannot do so, without any difference of opinion among 'our' masters; for if he were to take one part without the other, he would be dividing the contract as against the purchaser. He must, therefore, either take or leave the whole, whether the purchase be by one person from one, or by one from two or more persons. So that he cannot take the share of one of two sellers, whether the purchaser had or had not taken possession, according to the Zahir Rewayut, which is correct. When, however, two persons purchase from one person, the pre-emptor may take the share of one of the purchasers, according to them all, whether before or after possession; for the bargain has been separate from the

Though, when it is purchased by two persons, he may take

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beginning, and the taking of a part is no division of it; and that whether half the price were mentioned separately for each person, or one price were mentioned for both, and whether the contractor had contracted for himself or for another in both cases. So that if two men together were to appoint one person as their agent for purchase, and the agent should buy from two persons, and the pre-emptor should thereupon come to make his claim, he could not take the share of one of the sellers under his right of pre-emption. But if one man appoints two agents, and the two purchase from one person, the pre-emptor may take what one of the two has purchased. So also if ten agents purchase from one person, the pre-emptor may take from one, or from two, or from three. Moohummud has said that in this case regard is to be had to the actual purchaser, and not to the person on whose account the purchase has been made; and this is correct.

the share of one of them.

If part of the purchased property be separate and distinct from other part of it, as, for instance, when two mansions are purchased by one bargain, the pre-emptor cannot take one of them without the other, if he is *shufee* or has a right to the pre-emption of the two together. He must either take or leave both; and that, according to 'our' three masters, whether the mansions are adjacent to or separated from each other, and whether they are situate in one or two cities. Where he is the *shufee* of only one of the mansions, it is reported as from Aboo Huneefa that he cannot take more than that to which he is neighbour. And there is the like report as from Moohummud. But Husn has reported, as from Aboo Huneefa, that the pre-emptor may take the whole under his right of pre-emption. And this appears to indicate, according to another authority, that Aboo Huneefa was originally of the same opinion as Moohummud, but that he afterwards changed his opinion and came to treat the whole as one mansion.

Nor where two are purchased can he take one, if his right of pre-emption extends to both.

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CHAPTER VI.

OF THE SALE OF A MANSION IN WHICH SEVERAL PERSONS HAVE A RIGHT OF PRE-EMPTION.

Pre-emptors in the same degree have each a right in the whole, until resignation or decree;

It should be known that when there are several persons who have together a right of pre-emption to a mansion, each of them, before resignation or decree in his favour, has a right in the whole; and that if one of them gives up his right before taking possession and before decree, the others may take the whole. But after resignation, or after decree, the right of each one in that which has been resigned, or decreed to his fellow is made void. So that when there are two pre-emptors to a mansion, and the judge having decreed it between them, one of them surrenders his share, the other cannot take the whole.

and share equally *per capita.*

Pre-emption, according to 'us,' is by the number of heads (*per capita*). When a mansion is owned by three persons, one of whom has a half, another a third, and another a sixth, and the owner of the half having sold his share, it is claimed by the other two under their right of pre-emption, it is to be decreed between them in halves. Or if the owner of the sixth should sell his share, it is to be divided between the other two in halves. And if one of them should cause his right to drop, the whole belongs to all those that remain, according to their number. Or if one is absent, decree is to be given to those who are present according to their number. But if after decree of the whole to one who is present, a second should appear, half is to be decreed to him; and if a third should appear, decree is to be given to him for a third of what is in the hands of each of the other two. If the one who is present should surrender after decree has been given in his favour for the

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whole, the person who arrives is entitled to no more than a half.[1]

A decree in favour of one nearer in degree makes void the right of one more remote;

When one pre-emptor is stronger than another, that is, has a prior claim, and the judge passes a decree in his favour, the right of the weaker is made void. So that when there is a partner and a neighbour, and the former surrenders his right of pre-emption before a decree has been pronounced in his favour, the neighbour may take up the right; but if the surrender does not take place till after the decree, the neighbour's right is extinguished. And when one of two *shufees* is absent the one who is present may take the whole of the mansion, and if the purchaser should say, 'I will not give him except a half,' the *shufee* may still insist on having the whole. Yet if he should say 'I will take only a half or a third,' according to the amount of his right, he cannot do so without the purchaser's consent, and his only alternative is to take the whole or to abandon his claim altogether.

but a decree in favour of one more remote must be cancelled on the appearance of the nearer.

When a pre-emptor who is absent has a better right than one who is present, and decree is given for the whole to the one who is present, after which the absent one appears, as, for instance, if the first were a *khuleet* and the second only a neighbour, the judge is to cancel his decree in favour of the one who was present, and to decree for the whole in favour of him who was absent.

[1] The last paragraph is from chap. xvii. of the Digest, p. 305.

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CHAPTER VII.

OF DEALINGS BY THE PURCHASER WITH THE SUBJECT OF SALE, BEFORE THE APPEARANCE OF THE PRE-EMPTOR.

When a purchaser has built, or planted, or sown in land which is taken by a pre-emptor, he must remove the buildings and trees, but not the seed.

WHEN a purchaser has erected buildings, or planted trees, or sown seed in land, and a pre-emptor then appears and a decree is given in his favour, the purchaser is obliged to take up the buildings and trees in making delivery of the land to him; except that when the doing so would be injurious to the land, the pre-emptor has an option, and may take the land at its price, with the buildings and trees at their value as taken up.[1] This is according to the Zahir Rewayut; but with regard to seed, all are agreed that the pre-emptor cannot oblige the purchaser to take it up, but must wait for the ripening of the crops, and that the land is then to be taken at the full price. Then when the land is left in the hands of the purchaser, it is left without hire or rent. If, however, the land should be deteriorated by the sowing, and the *shufee* should then come, the price is to be divided according to the value of the land as deteriorated, and its value at the time of sale, and the *shufee* is to take the land at that price. And when a man has purchased a mansion, and has pulled down the buildings, or a stranger has done so, or they have fallen of themselves, and a pre-emptor then comes to claim his right, the price is to be divided according to the value of the buildings as they were while standing, and the value of

How the price is to be determined when the land is deteriorated

[1] Arab. *mukloun*. The word appears in the corresponding passage of the printed original of the *Hidayah*, though it has not been translated by Mr. Hamilton.—*Hedaya*, vol. iv., p. 586.

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the land; and the pre-emptor is to take the land at so much of the price as corresponds to its value.

by the sowing, or the purchaser has pulled down the buildings, &c.

This supposes that the ruined materials remain on the ground. But there is this difference between the two cases, that is the case where the buildings have been ruined by the act of the purchaser or a stranger, and the case where the buildings come to ruin of themselves; for in the former case, the price is to be divided with reference to the value of the buildings as they were when standing, while in the latter the price is to be divided with reference to their value in a state of ruin; because when the buildings have been destroyed by anyone he is responsible, and their value is to be estimated as of the time when his responsibility was incurred; while when they have come to ruin of themselves, no one being responsible, their value is to be estimated as of the state in which they actually are. So that if the value of the space be five hundred, and the original value of the buildings five hundred also, and the buildings were to fall down, leaving the old materials as of the value of three hundred, the price is to be divided into eight parts, and the pre-emptor to take the space at five eighths of it. If the buildings are burnt down, or swept away by an inundation, so as to leave nothing of the wreck in the hands of the purchaser, the pre-emptor must take the land at the full price, for no part of the thing sold remains in the hands of the former. If the purchaser should not pull down the building, but sell it without the land, and the pre-emptor then appears, he may dissolve the sale and take the whole. When the buildings have been pulled down by the purchaser or a stranger, or fallen of themselves, the pre-emptor may either take the space at its proportion of the price or abandon his claim; but he cannot take the old materials, since these have now become separate and independent of the land, and he has no right of pre-emption in them.

Acts of disposal by purchaser are liable to be can-

If the purchaser disposes of the purchased mansion before it is taken by the pre-emptor, as, for instance, by gift and delivery, or by letting it to hire, or converting it into a *musjid*, or place of worship, and allowing people to

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celled by the pre-emptor.

worship in it, or into a *wukf*, or a cemetery and burying in it, the pre-emptor may take the premises and cancel all those acts of disposal by the purchaser. But it is proper to observe that all a purchaser's acts of disposal with respect to a mansion claimed under a right of pre-emption are valid until the judge's order in favour of the pre-emptor, though the pre-emptor has the power of cancelling them all except only the act of taking possession and what is necessary to complete it; which if the pre-emptor should desire to cancel, that he may relegate the property to the seller and take it from him, he cannot do. If a person should purchase half a mansion undivided, the purchaser must take the portion which comes by partition to the purchaser, and cannot dissolve the partition, whether it were made voluntarily, or under the order of a judge. Contrary to the case of one of two partners selling his share in a mansion, and the purchaser's then making a partition with the other partner; for there the pre-emptor may cancel the partition, as the contract was not made with the party with whom the partition has been made, and the act of partition is not therefore a completion of the act of taking possession. When the purchaser has bequeathed the property, the pre-emptor may cancel the bequest, and take the property from the heirs, on whom are laid the obligations of the contract. And when a person who has purchased a village in which there are houses, and trees, and palms, has sold the trees and buildings, and the purchaser from him has cut down some of the trees, and pulled down some of the buildings, after which the pre-emptor appears, he is entitled to the land and so much of the trees and buildings as have not been cut or pulled down, and to a deduction from the price corresponding to those that have been cut or pulled down, which he is not at liberty to take. If a person should purchase a mansion, pull it down, and then rebuild one of increased value on its site, the pre-emptor may take the mansion, and divide the price according to the value of the lands and the buildings as they were on the day of the purchase, and the purchaser is obliged to remove those newly erected.

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CHAPTER VIII.

HOW THE RIGHT OF PRE-EMPTION IS RENDERED VOID AFTER IT HAS BEEN ESTABLISHED.

Two different ways in which it is made void.

THE right of pre-emption is rendered void in two different ways after it has been established. One of these is termed *ikhtiyaree*, or voluntary, the other *zurooree*, or necessary, The first is of two kinds—*sureeh*, express, and *dulalutun*, by implication. The right of pre-emption is rendered void *expressly* when the pre-emptor uses such expressions as these, 'I have made void the *shoofâ*,' or 'I have caused it to fall,' or 'I have released you from it,' or 'I have surrendered it to you,' whether the pre-emptor is or is not aware of the sale, provided, however, that it has actually taken place. The right of pre-emption is rendered void *by implication*, when anything is found on the part of the pre-emptor that indicates acquiescence in the sale to the purchaser, as, for instance, when, knowing the purchase, he has omitted, without a sufficient excuse, to claim his right (either by failing to demand it on the instant, or by rising from the meeting, or taking to some other occupation, without doing so, according to the different reports of what is necessary on the occasion [1]); or, in like manner, when he has made an offer for the house to the purchaser; or has asked him if he will give it up to him; or has taken it from him on hire, or in *moozaraut*—and all this with knowledge of the purchase. The right of pre-emption is rendered void *necessarily* when the pre-emptor has died

[1] See *ante*, p. 487.

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after the two demands,[1] and before taking the thing under the pre-emption; for the right is then extinguished, according to 'us.' But it is not made void by the death of the purchaser; and the pre-emptor may, accordingly, assert his right, and take the subject of sale from his heirs.

When and how the right may be surrendered.

The surrender of a right of pre-emption before a sale has taken place is not valid. Nor is it valid after the mansion which is the subject of sale has been taken by virtue of the right; nor, in the case of a gift for an exchange, before possession.[2] When the pre-emptor has said, 'I have surrendered the right of pre-emption in this mansion,' the surrender is valid, though no person is particularized. And, in like manner, if he should say to the seller, 'I have surrendered the right of pre-emption in this mansion to thee,' the mansion being still in the seller's possession, the surrender would be valid; and even though the words were uttered after delivery of the mansion to the purchaser, the surrender would still be valid on a favourable construction; while, if he should say to the seller, 'I have surrendered it for your sake,' or 'on account of you,' the surrender would be valid by analogy, as well as on a favourable construction. If he should say to the seller, 'I have surrendered to thee thy sale,' or, to the purchaser, 'I have surrendered to thee thy purchase,' the right would be annulled. But if he should say to a stranger, 'I have surrendered to thee the purchase of this mansion,' there would be no surrender, nor would the right of *shoofâ* become void.

The surrender may be suspended on a condition.

The *ibtal* or making void of a right of pre-emption may be lawfully suspended on a condition. So that when one has said, 'I have surrendered if you have purchased

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[1] Or before demand (*Doorr ool Mookhtar*, p. 704); and the same is implied in the reasons assigned in the *Hidayah* (*see* Translation, vol. iii., p. 601). The omission in the text may, perhaps, be accounted for by the title to the chapter, which has reference only to extinctions of the right *after it has been established*, and it is not established till demand.

[2] See *ante*, p. 488.

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for yourself,' and the purchase has, in fact, been for another, the right is not extinguished; for it is an *iskát*, or causing to fall, and that may be suspended on a condition.[1] When a neighbour has surrendered his right, while there is a partner subsisting, the surrender is valid. So that, if the partner should after this surrender his right, the neighbour could not take up the *shoofâ*.

Effect of misinformation as to the price or purchase on a surrender.

When the pre-emptor has surrendered his right on misinformation as to the amount or the kind of the price, or the person to whom the property has been sold, it is to be considered if his purpose would or would not have been changed had he been correctly informed; and if it would not, the surrender is valid and the right extinguished; but if it would, the surrender is not valid, and the right may still be asserted. When the pre-emptor has been informed that the price was a thousand *dirhems*, and has thereupon surrendered his right, but subsequently ascertains that it was a hundred *deenars*, he retains his right if the value of the hundred *deenars* be less than that of a thousand *dirhems*; while if such is not the case, the surrender is valid. When he has been told that the purchaser was such an one, and has thereupon surrendered his right, but, subsequently, ascertains that he was a different person, the right survives. If he was told that the purchaser was Zeyd, and thereupon surrendered his right, but it proves that Zeyd and Omar purchased, the surrender is valid as to the share of Zeyd, and the pre-emptor may still assert his right to that of Omar. If he surrenders on information that only half of a mansion has been sold, when, in fact, the sale has been of the whole, his right survives. But if he had surrendered on receiving information that the whole of the mansion had been sold, while the sale was, in fact, of only a half, his right is extinguished. If he is informed that the price was a certain commodity estimated by weight or measure of

[1] This is true, but does not prove that the *ibtal* of *shoofâ* may be suspended on a condition unless *shoofâ* be susceptible of *iskát*, which is denied a little farther on.

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capacity, and has thereupon surrendered his right, when, in fact, the price was in a different commodity, though still one estimated by weight or measure of capacity, the right survives under all circumstances, whether the price were the similar of, or more or less than, that mentioned to him.

The right is extinguished by exchange, which must be returned.

When the pre-emptor has compounded his right for an exchange, the right is made void, and the exchange must be returned; for the right is not *mookurrur*, or fixed and inherent in a thing, but only *moojurrud*, that is a naked or separate right to take possession of it. It is, therefore, not a fit subject for exchange.[1] And further, the *iskât* of *shoofâ* cannot be suspended on a condition,[2] even when the condition is lawful; as, for instance, when the pre-emptor has said to the purchaser, 'I will drop my right of pre-emption in the house that you have purchased if you drop your right of pre-emption in the house that I have purchased;' in which case the speaker's right of pre-emption would be lost, though the person addressed should not drop his right of pre-emption; and much more so when the condition is unlawful (as it would be if it were an exchange), and, therefore, in fact, a bribe. The right of pre-emption is also made void by a sale of it for property,[3] and the delivery of the property is not incumbent on the purchaser. If the pre-emptor should compound by taking half the mansion, for a part of the price, the composition would be valid. But not so if it were for an apartment in the mansion, for its share of the price, on account of the uncertainty, and the right of pre-emption would survive.

When the pre-emptor has different rights of pre-emption, the extinction of one does not affect the other.

When the pre-emptor is both a partner and a neighbour, and sells the share on which his right in the former capacity was founded, he may still assert his claim on the ground of neighbourhood.

[1] And see *M. L. S.* p. 51.

[2] This seems inconsistent with what has been said in page 506; but it is confirmed by the *Hidayah* and its commentaries the *Kifayah* (vol. iv., p. 948) and *Inayah* (vol. i., p. 271). If the *iskât* cannot be suspended on a condition, it follows that it must take effect immediately; the right consequently becomes void.

[3] Either to the seller or purchaser of the subject of *shoofâ*. *Kifayah*, ibid., p. 949.

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CHAPTER IX.

OF THE RIGHT OF PRE-EMPTION IN A YOUTH UNDER PUBERTY.

A minor, or a *fœtus* in the womb if born in due time, has the same right to pre-emption as an adult.

A YOUTH under puberty is in respect of the right of pre-emption on the same footing as an adult. Even a *fœtus* in the womb is in that respect like a grown person; and if born at less than six months from the time of purchase he has the right; but not so if his mother be delivered at six months or more from that date; for in that case his existence when the purchase took place is not established either in fact or by implication. If, however, his father had died before the sale, and the *fœtus* had inherited from him, he would be entitled to the right of pre-emption though his mother's delivery should take place at six months or more from the date of the sale; as in that case his existence at that time would be established by implication from his being heir to his father.

And the right may be demanded by his father or other legal representative.

When the right of pre-emption is established in favour of a minor, the person to demand and take possession is the same who is his legal representative in respect of all other rights,—namely his father, then his father's executor, then his paternal grandfather, then the grandfather's executor, then an executor or guardian who may be appointed by the judge. If there is none of these to represent him, his right of pre-emption remains till he attains to discernment.[1] When he has attained to that, and has at the same time the option of puberty and the right of pre-emption, he may either reject the marriage or demand

[1] Arab. *Idrak.*

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pre-emption; and whichever he first selects takes legal effect, but the other becomes void; a consequence, however, which may be averted by the device of saying, 'I demand both of them,' namely, the pre-emption and the option. If he has only one of these, and abandons the demand of pre-emption when able to make it, the right becomes void; so that if the minor should attain to puberty he would not have the power to avail himself of it, according to Aboo Huneefa and Aboo Yoosuf. And, according to the same authorities, if a father, or his executor, or anyone coming within the meaning of these, should surrender the minor's right of pre-emption, the surrender would be valid. So that, if the minor should attain to puberty he would have no power to take the subject of sale under the right of pre-emption,—whether the surrender were made at a sitting of the judge, or elsewhere.

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CHAPTER X.

OF DEVICES BY WHICH THE RIGHT OF PRE-EMPTION MAY BE EVADED.

SECTION FIRST.

Of Devices in general, and how they are lawful.[1]

ACCORDING to the learned of 'our' sect, every device which a man employs for the purpose of annulling the right of another, or throwing doubt upon it, or leading one to suppose it to be void, is abominable; and every device which a man employs for obtaining delivery from what is unlawful, and attaining to what is lawful, is good. The principle on which this kind of device is held to be lawful is the saying in the sacred text, 'Take in thy hand a handful of green and dry stalks mixed,[2] and beat her with that, and be not forsworn,' which was delivered as an instruction to the Prophet Job, and to 'our' Prophet, to extricate him from his oath to beat his wife with a hundred blows of a stick.[3] The general body of *sheikhs*

Devices for annulling the right of another are abominable;

though not inoperative.

[1] *Fut. Al.*, vol. vi., p. 559.

[2] *Thighth*—Manipulus herbarum ex virentibus et aridis mistarum (Freytag). 'The original not expressing what this handful was to consist of, one supposes it was to be a handful of dry grass or of rushes, and another that it was a branch of a palm-tree.'—Sale's Koran, 4th ed. note, p. 375.

[3] *Ood*—wood. Literally, with a hundred *ood*. The commentators are not agreed what fault Job's wife committed. 'One opinion is,

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[illegible] the effect of the device is not cancelled, [illegible] on the subject.

Section Second.

[illegible] to Pre-emption.[1]

[illegible] prevent liability to the [illegible] diminish the desire of [illegible] of it. Among them are [illegible] The seller may give the mansion to [illegible] witnesses to attest the transac- [illegible] may then give the price to the [illegible] witnesses to attest the transaction. [illegible] such a case, because [illegible] of exchange; and [illegible] of an exchange, [illegible] by the subsequent delivery [illegible] is necessarily restricted [illegible] make a gratuitous dis- [illegible] would not be available to fathers [illegible] their wards' property, or to an agent [illegible] A [illegible], or place in [illegible] and marked off with a line, [illegible] charity, or of gift, [illegible] and then the remainder of it sold,— [illegible] right of the pre-emptor is evaded. The [illegible] is to prevent the gift from [illegible] or undivided share, in property

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[illegible] that if she would worship him he would [illegible] whereupon she asked her husband's con- [illegible] with her at the proposal that he swore he [illegible] stripes'—Sale, note, p. 271. It would [illegible] Mohammed himself had made a similar rash [illegible] in the Koran apparently alludes to it, for it [illegible] 'And remember our servant Job,' &c.; and [illegible] Take a handful,' &c.—*Ibid*, p. 375.

[illegible] p. [illegible]

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that is susceptible of division; and the right of pre-emption is prevented by the purchaser's becoming a partner,[1] and as such, having a preferable right to the neighbour's. It is made a condition that the *sudukah*, or gift of the *mouza*, should be made with its right of way, because, otherwise, the person in whose favour it is made would be only a neighbour to the purchased property, and as such have no preferential right over another neighbour. This device, it may be observed, is only proper for defeating the right of a neighbour, not that of a *khuleet*. 3rd. With regard to vineyards and lands, if a device is required to prevent liability to the right of pre-emption, the trees may be sold or given, with their foundations, and then the purchaser will become a partner in the property, and may afterwards purchase the remainder; or, if a device is sought for lessening the pre-emptor's desire to assert his right, the trees may be sold first at a low price, and then the lands may be bought by the purchaser of the trees at a high price. 4th. When a purchase is intended for a hundred *dirhems*, it may be made openly for a thousand or more, and then the purchaser may give the seller a piece of cloth, of the value of a hundred, in lieu of the price; whereupon, if the pre-emptor should come to make his claim, he must take the purchase at the ostensible price, which its magnitude will disincline him to do. 5th. The seller and purchaser may declare that the sale was invalid, or a *tuljeea*,[2] or with a condition of option to the seller, and their declaration must be accepted, which being the case, there is no room for a claim of pre-emption, for it is well known that to found such a claim it is necessary that there be an entire cessation of the seller's right for a valid cause. 6th. When a man sells his mansion, excepting the breadth of a cubit along the boundary of the pre-emptor, the latter has no right of pre-emption, because his neighbourhood is cut off; and this is a device

[1] That is, in the way; more properly a *khuleet*.
[2] See *M. L. S.*, p. 304.

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by which his right may be evaded. In like manner, when such an extent is given to him, and delivered, the pre-emptor's right is evaded, for the same reason.[1]

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[1] *Hidayah*, vol. iv., p. 953. This device, however, is imperfect, for it leaves the slip undisposed of.

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BOOK VIII.

OF GIFT.[1]

CHAPTER I.

DEFINITION, CONSTITUTION, CONDITIONS, KINDS, AND LEGAL EFFECT OF GIFT, AND WORDS BY WHICH IT IS, AND IS NOT, CONSTITUTED.

Definition.

GIFT (*hibut*[2]), as it is defined in law, is the conferring of a right of property[3] in something specific, without an exchange,

Constitution.

Its pillar is the declaration of the donor (*wahib*), 'I have given,'[4] for that constitutes the gift, and it is completed by the act of the owner alone, acceptance being required only for the purpose of establishing the property in the donee (*mowhoob lehoo*). So that when a man has sworn that he will not make a gift, and does so notwithstanding, he is forsworn though the donee should not accept.

Conditions.

A gift must not be dependent on anything contingent,

[1] *Fut. Al.*, vol. iv., p. 520.

[2] Usually pronounced *heba* in India.

[3] *Tumleek* (from *milk*, ownership). Hence *Tumleek nameh*, applicable alike to a deed of sale or of gift.

[4] According to the *Hidayah* (vol. iii., p. 673), 'gift is constituted by *eejab-o-kubool*, or declaration and acceptance;' and according to the *Kifayah* (ibid.), these are its pillars. The *Doorr ool Mookhtar* is to the same effect (p. 633). But they concur with the *Inayah* (vol. iv., p. 20) that declaration is sufficient, so far as the donor is concerned. And see *post*, p. 522.

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as the entrance of Zeyd, or the arrival of Khalid; nor be referred to a future time, as, for instance, by saying, 'I give (or will give) this thing to thee to-morrow,' or 'at the beginning of the month.' Hence *rookba* is void; as when one person says to another, 'My mansion is thine *rookba;*' meaning, 'If thou diest, it is mine; if I die, it is thine;' as if each were contemplating the death of the other. The giver must be free, sane, adult, and the owner of the thing given. The thing itself must be in existence at the time of the gift; so that if one should give 'the fruit that may be produced by his palm-tree this year,' or 'what is in the womb of this slave,' or 'of this sheep,' or 'in its udder,' the gift is unlawful, though power be given to take possession at the time of production, as of birth or of milking. So also as to 'the butter in milk,' 'the oil in sesame,' or 'the flour in wheat,' with similar powers. The subject of the gift must also have legal value; and possession must be taken of it to establish in it the right of the donee;[1] and if in its nature divisible, it must be divided, and distinguished from, and not joined to, or occupied with, anything else that is not given. Hence the gift of land without the crop then standing on it, or of a palm-tree in bearing without its fruit, and *vice versâ*, is unlawful. So also of a house or vessel in which there is something belonging to the donor, without its contents.

Kinds. Gift is of two kinds, *tumleek* (already described), and *iskât*, which means literally, 'to cause to fall,' or extinguish.[2]

Legal effects The legal effects of gift are—1st. That it establishes a right of property in the donee, without being obligatory on the donor; so that the gift may be validly resumed

[1] This important condition is founded on an express saying of the Prophet, that 'a gift is not valid unless possessed.'—*Inayah*, vol. iv., p. 24.

[2] *Iskât* is properly applicable only to mere rights (*post*, chap iii.); and gift by *tumleek* is restricted by the definition to *ayn*, or specific things. *Deyn*, or indeterminate things, that is, things which consist *numero, mensura, pondere* (*M. L. S.* Introduction), seem, therefore, to be excluded from the operation of gift, till rendered specific by actual production or pointed reference.

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or cancelled. 2nd. That it cannot be made subject to a condition; though if a gift were made with an option to the donee for three days, and were accepted before the separation of the parties, it would be valid. And 3rd, That it is not cancelled by vitiating conditions; so that if one should give his slave on condition of his being emancipated, the gift would be valid, and the condition void.

Words by which gift is constituted.

The words by which gift is effected are of three kinds: First, those which are fitted or appropriated to the purpose, as, 'I have given this thing to thee,' or 'I have invested thee with the property of it,' or 'I have made it to thee,' or 'This is to thee.' Second, those in which the meaning is veiled under an allusion, but are known to signify gift,[1] as 'Thy garment is this piece of cloth,' or 'I have invested thee with this mansion for thy age,'[2] which would be a gift. So also if he had said, 'This mansion is to thee *oomree*' (for thy age—*oomr*), or '*hyátee*' (for thy life—*hyát*), 'and when thou art dead it reverts to me,' in which case the gift is lawful, and the condition void.[3] Third, words which bear equally the construction of gift and of *âreeut*, or commodate loan, as 'I have given thee this food for food,' an expression which, if he should say 'Take possession of it,' would be a gift, but without these words might be either a gift or commodate loan.[4] And if one

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[1] *Kinayut o ârfun.*

[2] The word employed here is a verb derived from *oomr*, age.

[3] From this it appears that gift cannot be limited in respect of time, any more than sale (*M. L. S.*, p. 4). But why, it may be asked, is the gift valid in this case, and not so in that of the *rookba*? The reason assigned for this in the *Hidayah* (vol. iii., p. 698) is that the Prophet allowed it in the one case, and rejected it in the other.

[4] The words of the third kind are plainly equivocal, and the authority cited is the *Mooheet oos Surukhsee*. But in the *P. P. M. L.* it is stated (Gifts, No. 8), on the authority of an extract from the same work, that 'A gift cannot be implied; it must be express and unequivocal.' This appears to me to be a mistake, for there is nothing in the extract that gives any support to this part of the principle; and it seems to be inconsistent with the second and third kinds of words. But perhaps all that the learned author meant by express is, that

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should say, 'I have mounted thee on this beast,' it would be a loan, unless gift were intended. The principle in cases of this kind is that when a word is employed which has reference to the body of the thing, it is a gift; and when a word is employed which has reference to the profits of the thing, it is a loan; and when the word may be understood in either sense, the meaning is to be determined by intention. Thus, if one should say, 'My mansion is to thee a gift, thou wilt inhabit it,' or 'This food is to thee, thou shalt eat it,' or 'This garment is to thee, thou shalt put it on,' it is a gift.[1] A man has *dirhems* of another in his possession, and the owner of them says to him 'Expend them for your necessities:' this is a *kurz*, or *mutuum* loan;[2] but if instead of *dirhems* the person had wheat in his possession, and the owner should say, 'Eat it,' that would be a gift.

Miscellaneous cases.

A man says to another, 'This mansion is to thee,' or 'This land is to thee'—this is a gift, not an *ikrar*, or acknowledgment. And if one should say, 'This is a gift to thee, and thy posterity after thee,' it would be a gift, the latter words being treated as a mistake or surplusage.[3] So also if he were to say, 'It is to thee, and thy posterity after thee.' If a person should say, 'All my property, or everything I own, is to such an one,' the words would constitute a gift, which would not be lawful without taking possession. But if he should say, 'All that is known as mine, or is related to me, is to such an one,' the words would be an acknowledgment. A man says, 'I have given this to my child such an one'—this is a gift; and if he should say, 'This thing is to my little child such

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gift cannot be implied from circumstances and must be expressed in words. If so the statement is unobjectionable.

[1] The words, 'Thou wilt inhabit,' &c., being in the nature of counsel, not explanation.—*Doorr ool Mookhtar*, p. 633.

[2] Being of the class of things that are consumed in the use, *dirhems* cannot be the subject of *áreeut*, or commodate loan.

[3] Words of inheritance are not necessary to make the gift absolute as they would be in English law in the case of a gift of land; and the estate will pass to heirs without them, if undisposed of by the donor.

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an one,' it would be lawful and complete without acceptance.[1] When there is a piece of cloth in the hands of a person in deposit, and he says to the owner of the cloth, 'Give it to me,' and the owner answers, 'I have given it to thee,' this is a gift; but if the cloth were in the hands of the owner himself, and the same words passed between them, it would be a deposit. If one should say, 'This mansion,' or 'this land,' or 'this maid, is *minha* of thee (thy *minha*),'[2] it would be an *âreeut* loan, unless gift were intended. But if he should say, 'This food,' or 'these *dirhems*,' or 'these *deenars*, are *minha* to thee,' and so also of everything else of which the benefit cannot be derived except by consumption of the substance, it would be a gift. When again the word is used in connection with things of which the benefit may be derived consistently with the subsistence of the thing itself, the transaction is an *âreeut* loan, because it is the best meaning that can be put on the word; while if it is referred to something of which the benefit cannot be obtained without its destruction, 'we' make it a gift.

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[1] The father's possession accruing for the benefit of the minor child: see *post*, p. 538.

[2] *Donum* (Freytag). The word seems to be synonymous with *hibut*.

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CHAPTER II.

OF LAWFUL AND UNLAWFUL GIFTS.

Gifts that are lawful.

THE gift of a thing which is separated[1] from, and emptied[2] of, the property and rights of the donor is lawful; so also of a *mooshââ*,[3] or undivided part of a thing that does not admit of partition, or is of such a nature that some kind of benefit or advantage that can be derived from it, while whole or undivided, cannot be derived from it after partition, as, for instance, a small house, or small bath. But the gift of a *mooshââ* in a thing that admits of partition consistently with the preservation of all the uses which might be made of it before partition, is not valid. What is required is that the thing given be partitioned and separated at the time of taking possession, not at the time of gift, as is evidenced by the fact that if one person should give another the half of a mansion undividedly, and should not make delivery till he has given the other half, and should then make delivery of the whole, the gift is lawful; though if half the mansion were given and delivered, and then the remaining half were given and delivered, the transaction would not be lawful, but both gifts would be invalid.

But their legal effect is not com-

The legal effect of gift is not complete until possession is taken of the thing given;[4] and, in this respect, a

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[1] *Moohuwwuz*, an increased conjugation from *hazu*. 'Collegit ab omni parte et contraxit *ad se rem*.'—Freytag.

[2] *Moofurrugh*. [3] 'Pluribus communis.'—Freytag.

[4] For this purpose the possession must be *kamil*, or perfect (*Doorr ool Mookhtar*, p. 634). There are three obstructions to a perfect possession:—First, the subject of gift may be joined to something

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stranger and the child of the donor are on the same footing when the child is adult. The possession on which the completion of the gift and the establishment of its legal effect are dependent, is possession taken with the permission of the owner—a permission which is sometimes express, but, at others, has to be established by evidence. It is express when a person says, 'Take possession of it,' when the subject of gift is produced at the meeting, or 'Go and take possession of it,' when it is not produced at the meeting. In the former case, if possession is taken either at the meeting, or after the parties have separated, it is valid, and the donee becomes the proprietor of the thing given, both by analogy and on a liberal construction of law. But if after the gift he is forbidden to take possession, and does so notwithstanding, the possession is not valid, whether taken at the meeting or after separation from it. When the donee is neither expressly permitted nor forbidden to take possession, and does so at the meeting, the possession is valid on a favourable construction of law, though not so by analogy. But if possession is not taken till after separation from the meeting, the possession is not valid, either by analogy or on a favourable construction. When, again, the subject of gift is not produced at the meeting, and the donee goes and takes possession, the possession is lawful on a favourable construction, though not by analogy, if taken with the permission of the donor; but if taken without his permission, it is not lawful either by analogy or on a favourable construction. If a person should say, 'I have given thee this slave,' the slave being present, and possession is

plete without possession.

that is not given, as fruit on the tree or crops on the ground—when either is given without the other. Second, it may be *mushghool*, or occupied with something that is not given (see *post*, p. 528). Third, it may be *mooshââ*, or confused with something else by being *mooshturruk*, or held in copartnership with another. The first is obviated by the gift being *moohuwwuz*, or separated (*Inayah*, vol. iv., p. 23); and the second by its being *moofurrugh*, or emptied. In the third case the gift being unlawful when the property is susceptible of partition without injury, possession if taken would be invalid. (See *post*, p. 523).

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taken, the gift is lawful, though the donee should not have said 'I have accepted.' And though the slave were absent, yet if the donor should say, 'I have given to thee my slave, such an one: go and take possession of him,' and the person addressed should take possession, the gift would be lawful, though he should not have said, 'I have accepted.' When a person has given his slave to another, all three being present together, without saying, 'Take possession of him,' and the donor goes away leaving the slave, the donee cannot afterwards take possession of him without a direction to that effect. And if a slave were given to a person who did not take possession of him, and were then given to another, after which both were directed to take possession, and both should take possession, he would belong to the second, So also if the first were directed to take possession and should do so, it would be void.

Power to take possession is sometimes equivalent to taking it.

If one should give another a piece of cloth in a locked box, and should deliver the box to him, it would not be possession, for want of ability to take the cloth out of it; but if the box were open it would be possession by the party being able to take it, as in the case of vacating in sale. It is only, however, when a gift is valid that vacating is effectual; for it is not so with invalid gift.[1]

Possession need not be renewed when the subject of gift is already in the hands of the donee.

When the subject of gift is in the hands of the donee, either as a deposit or commodate loan (*âreeut*), or trust (*amanut*), he becomes the proprietor of it by the gift and acceptance, though his taking formal possession of it should not be renewed. And if the owner of property let to hire, or usurped, should give it to the tenant or usurper, the gift would be lawful, and the receiver of it freed from all responsibility. Or if a thing were in any other way in the hands of a person on his responsibility, as, for instance, a thing on an offer of sale, and it were given to him, the gift would be valid, and the property be established in him by the mere contract. If the thing given were in pledge in

[1] *Doorr ool Mookhtar*, p. 634. *Fut. Ka. Kha.* (vol. iv.) p. 172 As to *vacating* in sale, see *M. L. S.* p. 29.

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the donee's hands, it is reported in the Jama that he would become possessed of it under the gift; the previous possession under the pledge being converted into a possession under the gift; and as the gift would be completed by possession, the pledge would be cancelled, and the pledgee entitled to have recourse to the pledger for his debt. The general principle in these cases is, that when two possessions are of the same kind, one may be substituted for the other; and that when they differ, that which is under responsibility may be substituted for that which is not; but that which is not under responsibility cannot be substituted for that which is.[1] To renew possession when required, the donee must go to the place where the subject of gift may happen to be, and a sufficient time must elapse to enable him to do so.

Gift of *mooshââ*.

The gift of a *mooshââ*, or undivided part, of what does not admit of partition is lawful—to a partner or to a stranger. The gift of a *mooshââ* in what does admit of partition is not lawful[2]—either to a partner or one who is not a partner; and if possession is taken of it, Husam ood Deen has reported that it will not avail to establish property in the donee; but he has said in another place that it will avail to establish it invalidly, and so it has been decided.[3]

What is necessary to its validity.

When a gift is made of a *mooshââ* in property that does not admit of partition, it is a condition of the validity of the gift that the quantity be known; for if one

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[1] *Jowhurrut-oon-Neyyerath*, and see *M. L. S.*, p. 38.

[2] In Mr. Hamilton's translation of the *Hidayah* (vol. iii., p. 295), the gift of an undefined portion of land is said to be null; but in the original (vol. iii., p. 680), the corresponding word is only *fasid*, or invalid. And in the *P. P. M. L.* (Gifts, No. 6), the gift is said to be 'null and void;' but in the authority cited under the same number in the Appendix, the corresponding expression is merely, 'It is not lawful,' as above. The distinction is of importance, as will be seen a little farther on.

[3] The *Sirajiyyah* is the authority cited. The *Kifayah* also mentions the last report of Husam without the word 'invalidly,' and adds that several of 'our sheikhs have adopted it' (vol. iii., p. 680).

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were to give his share in a slave, the share being unknown, the gift would not be lawful, as ignorance of the share might lead to disputes. When the donee is acquainted with the share of the donor, the gift ought to be lawful, according to Aboo Huneefa, but it is not lawful according to the other two.

Gift of *mooshâá*, from one to two or more.

The gift of a *mooshâá* in property that admits of partition, to two men or to a group, is valid according to the two disciples, and invalid according to Aboo Huneefa.[1] But it is not void; so that it avails to the establishment of property by possession.[2] Sudur Ash Shuheed has remarked that when a person has given what admits of partition to two men, so that the gift is invalid according to Aboo Huneefa, and possession is then taken, the right of property is established in them *invalidly*; and so it has been decreed.[3] Confusion[4] on both sides in property susceptible of partition prevents the legality of gift, ac-

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[1] 'The authorities on Moohummudan law differ on this question' (the validity of a joint gift without discrimination of shares); 'but the prevailing authorities admit the validity of the gift' (*Reports S. D. A. Calcutta*, vol. i., p. 115). In a subsequent case, however (vol. iv., p. 210), the law officer of the provincial court of Patna gave his *futwa* against the validity of the gift. The *futwa* being confirmed by that of the law officers of the S. D. A., it was adopted by both courts, in opposition to the *futwa* of the law officer of the zillah of Sholabad, which was in favour of its validity.

[2] In the case referred to in the preceding note, the law officers were not asked their opinion as to the effect of possession under an invalid gift; and it does not appear that this part of Aboo Huneefa's opinion was brought to the notice of the court. The decision, therefore, which set aside the gift, though possession had been formally given by the donor, and was never revoked by her, and could not then be revoked, as she was dead, seems to have been passed on an imperfect representation of the Moohummudan law, even according to Aboo Huneefa.

[3] The remark of Sudur Ash Shuheed aggravates the difference between the master and his disciples. In the preceding sentence, which is from another authority, it is said that possession avails to the establishment of property absolutely, which agrees with the report of Husam's opinion in the *Kifayah*, referred to in a previous note: though it must be admitted that the author himself is of a different opinion.

[4] *Shooyood*; infinitive, from which *mooshâá* is a derivative.

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cording to them all; and when the confusion is only on the side of the donee, it prevents the legality of the gift, according to Aboo Huneefa, though it has not that effect in the opinion of the disciples. And if one should make a gift to two persons who are poor, it would be lawful according to them all, as in the case of *sudukah*, or alms. But if they are rich, and the gift is made to each of them in halves, or if it is made vaguely by saying, 'I have given to you both;' or with an excess in favour of one, as by saying, 'To this one a third of it, and to this one two-thirds of it;' it is unlawful in the three cases, according to Aboo Huneefa; while, according to Moohummud, it is lawful in them all; and according to Aboo Yoosuf, it is lawful in the two cases where the gift is made to both indefinitely, or in halves, but is not lawful with any excess in favour of one of them. When two persons have given a mansion to one person, the gift is valid, according to all opinions.[1]

From two to one.

The confusion that invalidates a gift is one that is original, not supervenient, as, for instance, when one has given the whole of a thing, and subsequently revokes a half or other undivided share of it, or a right is established to a half or other undivided share of it, the gift is not invalidated as to the remainder. This is different from the case of pledge, which is invalidated by a supervening confusion.[2]

Difference between original and supervenient confusion in a gift.

If a person should give an undivided part of a thing that admits of division, and then make a partition and

Partition before delivery

[1] A gift of *mooshâ* may be made in three different ways. First, a person having the whole of a thing may give an undivided half or other share in it to another. Here there is confusion on both sides, and the gift is unlawful, without any difference of opinion. Second, a person having the whole of a thing may give it entire to two or more persons undividedly. Here there is confusion on the side of the donee only, and there is the difference of opinion noticed in the text. And, third, two or more persons having a thing in undivided shares may combine in making a gift of it entire to one person. Here the confusion is only on the side of the donor, and the gift is valid, without any difference of opinion.

[2] And see *Hedaya*, vol. iv., p. 204.

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renders a gift of *mooshââ* valid.

deliver the part, the gift would be valid. But if he give a half and deliver the whole, the gift is not lawful; while if he give the whole, and deliver it separately, the gift is lawful.

The gift of a *mooshââ* in several things of different kinds, or in a right of way, is lawful.

A gift by one person to two others of the half of two slaves, or of two or ten pieces of cloth of different kinds, as cloth of Meroo and cloth of Herat, is lawful when followed by possession. So also of cattle of different kinds. But if the cloth or cattle be of the same kind, the gift is not lawful, unless a partition is first made. In like manner, the gift of a share in a wall or way or bath is lawful, when accompanied with a power to take possession. As, for instance, when a house is given with all its rights and boundaries, which include a party-wall, or a right of way, held in common with other persons, the gift is lawful as to these also.

Possession under an invalid gift induces responsibility.

An invalid gift is on the donee's responsibility after possession has been taken of it;[1] as, for instance, when one person has given to another a thousand *dirhems*, saying, 'Half in *moozarubut* and half as a gift,' and the whole is lost in the hands of the *moozarib*, or manager, he is liable for so much of the money as was a gift.[2] A person commits nine *dirhems* to another, saying, 'Three of them in payment of your right, three as a gift, and three as *sudukah*, or charity,' and the whole are lost, according to Moohummud the three by way of payment are lawful, the three by way of alms unlawful, and the donee is not responsible, while the three by way of gift are unlawful, but the donee is responsible, because an invalid gift infers responsibility.[3] A person gives half of his mansion as a gift, and half as alms, and the donee accepts and takes possession, this is lawful, but the donor can revoke the half named a gift.

Though possession has been delivered

If half a mansion were given by way of gift, or in charity, and delivered, and the donor should then sell, or give it by way of charity to another person, it is men-

[1] Not so of a valid gift. See *post*, p. 537.

[2] The *Âtabeeah* is cited. [3] *Fut. Ka. Kha.*, vol. iv., p. 174.

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tioned in the Asul that the sale would be lawful.[1] And it is also reported in the Asul that if half a mansion were given to a person, and delivered to him, and the donee should sell it, the sale would not be lawful, and it is expressly stated in some *futawa* that this is approved. But it is said in other authorities that possession under an invalid gift avails to the establishment of property, and that it has been so decided, contrary to what is stated to be valid in the *Amadeeah*; and the word *futwa*, or decision, is stronger than the word valid.[2]

of half a mansion, the donor may still dispose of it, and it is at least doubtful whether a disposal by the donee would be lawful.

If a man should make a gift of a mansion in which there are some effects belonging to him, and should deliver the mansion to the donee, or deliver it with the effects, the gift would not be valid.[3] But there is a device by which a valid gift can be made of the mansion; and it is by first making a deposit of the effects with the donee, vacating them for him, and then making delivery of the mansion. And, in the opposite case, if he should make a gift of the effects without the mansion, and vacate them for the donee, and then make delivery of the mansion, the gift would be valid;[4] and if he should make a gift of the mansion and effects together, and vacate them both for the donee, the gift would be valid. If a separation is made in the delivery, as by giving one of the two and delivering it, and then by giving the other and delivering it, and a beginning is made with the mansion, the gift of the mansion is not valid, but that of the effects is valid, while, if a beginning were made with the effects,

Gift of mansion in which there are effects of the donor is not lawful.

But a gift of the effects is lawful.

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[1] The *Asul*, which is another name for the *Mubsoot*, was from the pen of Moohummud, and it will be remembered that there was no difference of opinion as to the illegality of the gift in this case.

[2] *Doorr ool Mookhtar*, p. 634. It is only in the *shurh* or comment that this is mentioned, and the text is express that 'if delivery be made undividedly, the donee does not acquire the property nor is his disposal of it operative.'

[3] Because the gift is occupied with something not given (*Fut. Ka. Kha.*, vol. iv., p. 195).

[4] Because here the gift is not the occupied, but the occupier. (*Ibid*). See next paragraph.

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the gift of both would be valid together. And if one should give land without a growing crop, or the crop without the land, or trees without their fruit, or fruit without their trees, and vacate them for the donee, the gift would not be valid in either case; for the union of each with its fellow is such that the parts of one are in contact with the parts of the other, and the gift is like that of a *moosháâ* in a thing susceptible of partition. But if he should give each of them separately, as, for instance, the crop and then the land, or the land and then the crop, and deliver them together, the gift would be lawful as to both; while, if he separate them in delivery it is valid as to neither, whichever he may begin with. If he gives the mansion and does not deliver it till he gives the effects also, and then delivers them together, the gift is lawful; in the same manner as when one gives a bag and corn sacks, and does not deliver them until he makes a gift of the corn contained in them, and then delivers both, the gift is lawful as to the whole. But if the mansion is given empty, and then delivered *mushghool*, or occupied, it is not valid; nor would his saying, 'Take possession,' or 'I have delivered,' be valid when the donor, or his people, or goods are in the mansion.[1]

General principle as to *shaghil* and *mushghool*, or occupier and occupied.

The gift of a *shaghil*, or thing which occupies another, is lawful, but the gift of the *mushghool*, or thing occupied, is unlawful. The principle in this kind of cases is that the thing given being occupied with property of the donor prevents the taking of possession, which is necessary to the completion of the gift, but that the thing given occupying the property of the donor has not that effect. As an example of this, the gift of a leathern bag, in which there is food of the donor's, is not lawful, while a gift of the food in the bag is lawful. And if one should give a beast of burden having a load upon his back, the gift

[1] This is called vacating, which is insufficient according to all opinions when the gift is invalid. When valid, vacating is held by Moohummud to be equivalent to seizin. *Fut. Ka. Kha.*, vol. iv., p. 176.

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would not be lawful; but if the burden is given, and beast and burden delivered together, the gift is lawful. So also the gift of a pitcher without the water in it is not lawful, but the gift of the water without the pitcher is lawful. If a man should give the crop on his land, or the fruit on his tree, and direct the donee to reap or to gather it, and he should do so, the gift would be lawful on a favourable construction; but if he is not permitted to take possession and does so, he is responsible.

A gift is rendered void by a right being established in part of it.

If a person should give a mansion with its effects and deliver them both, and a right is subsequently established to the effects, the gift of the mansion is valid. So also if one should give sacks with goods in them, or a bag with the food in it, and deliver them to the donee, and a right is subsequently established to the contents in either case, the gift remains complete as to the sacks and the bag. But if one should give a mansion of which possession is taken, and a right is then established in a part of it, the gift is void.[1] And if one should give land with the crop upon it, or a tree with the fruit on it, and make delivery of both, and a right should then be established in the crop or the fruit, the gift in the land or trees is void. A person makes a gift of his land with the crop on it, and cuts and delivers the crop, after which a right is established in one of them, the gift is void as to the other.[2]

Gift by one partner to another of a share in the profits not lawful.

When a man has given property which is in *moozarubut* to the *moozarib*,[3] and part of it is in his hands, and part of it due by others, the gift is lawful as to the former, but as to the remainder it is lawful only if the donor have said, 'Take possession;'[4] and if any part of the property be gain, the gift is not lawful.[5] When one of two partners has said, 'I have given thee my share of

[1] In the case of supervenient confusion (p. 525), the right is established to an undivided share; here it is to a distinct part.

[2] The authority cited is confirmed by the *Fut. K. Kha.*, ibid.

[3] That is when the owner of the capital stock has made a gift of it to the manager.

[4] For the reason of this, see next chapter.

[5] Because in the gain they are partners.

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the profit,' it has been said that if the property itself be in existence, the gift is not valid, by reason of its being *mooshââ* in what admits of partition; but if the partner has lost the property, the gift is valid by reason of its being an *iskât*, or extinction of right.

Gifts by *tuhleel*.

If a person should say to another, 'It is lawful for you to eat of my property,' he may do so; and when one says to another, 'He who eats of my property is doing what is lawful,' the *futwa* is that he may do so. A person says, 'He who eats of the fruit of my tree is doing what is lawful'—the person addressed need be under no apprehension in doing so, whether he be rich or poor.[1]

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[1] The objection of indefiniteness, pushed to an extreme, would prevent the person addressed from lawfully availing himself of the permission; and I have inserted these few cases from the third chapter to show how the objection is evaded by use of the expression *tuhleel*, 'to make lawful.' The title of the chapter is, 'Of what depends on *tuhleel*.'

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CHAPTER III.

OF THE GIFT OF A DEBT TO THE DEBTOR.

Gift of a debt.

THE gift of a debt to the debtor is a release,[1] and it is lawful, both by analogy and on a liberal construction of law. The gift of a debt to any other than the debtor is lawful on a liberal construction, when the donee is directed to take possession of the debt. The gift of a debt or a release of it to the debtor, is complete without his acceptance, though it is reversed by his rejection.[2] But this is true only with respect to the principal debtor; for the gift of a debt to a surety is not complete without acceptance, though it is reversed by rejection. Yet a release to him is complete without acceptance; and it is not reversed by rejection. If the creditor releases the principal debtor from the debt, or gives it to him and he accepts, both he and the surety are released; but if he do not accept, he is not released.[3] A man who is in debt dies before payment, and the creditor makes a gift of the debt to the heir—the gift is valid; and if it is to some of the heirs, it accrues to the benefit

[1] *Hidayah*, vol. iii., p. 698.

[2] A debt considered with reference to the prospect of payment is *mal*, or corporeal property, and is susceptible of *tumleek*. Considered with reference to its present state, it is a *wusf*, or quality (indebtedness), and is susceptible of *iskat*, or extinction. Hence a gift of it to the debtor himself, which is an extinction, is valid, both by analogy and on a favourable construction; but a gift of it to another, which is *tumleek*, is valid only on the latter ground.—*Hidayah*, and *Kifayah*, ibid.

[3] That is, the surety is not released; for it has been said above that a gift and release to the principal are complete without acceptance.

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of all. If a debtor should say to his creditor, 'Release me from what I owe thee,' and he should say, 'I have released thee from my debt against thee,' and the other should then reply, 'I will not accept,' he is released notwithstanding.[1] One of the heirs of a creditor gives his share in a debt to the debtor before partition, and in the deceased's estate there are both money and goods—the gift is good on a liberal construction, like a composition.[2] And the gift by a creditor of his share in a specific thing to an heir of the debtor, or to any other person, is valid if the thing does not admit of partition; but if it does admit of partition, the gift is not valid.

The gift of a debt is not reversed by subsequent rejection.

A creditor makes a gift of his debt to his debtor, who neither accepts nor rejects it at the meeting, and then comes after the lapse of some days and rejects the gift; there is some difference of opinion on the point, but the sound doctrine is that the gift is not reversed.

The gift of a share in a debt to the debtor is valid.

When a debt is due to two persons, and one of them gives his share to the debtor, the gift is valid. When a person who is in debt gives property to his creditor, the creditor becomes the proprietor of it by virtue of the gift, not of the debt.

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[1] The transaction being completed by the request and answer.

[2] If there were goods alone or money alone, the estate, including the debt, would be homogeneous; and being susceptable of partition, a gift of a share in it would be liable to the objection of *mooshâá*.

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CHAPTER IV.

OF THE REVOCATION OF GIFTS, AND WHAT PREVENTS AND DOES NOT PREVENT THEIR REVOCATION.

Revocation of gift is valid, though abominable.

THE revocation of a gift is abominable under any circumstances; but it is valid nevertheless. Gifts are of several kinds, some being to relations within the prohibited degrees, some to strangers, some to relatives who are not within the prohibited degrees, and some to persons who are prohibited but not relatives. All may be revoked before delivery to the donee, whether he were present or absent at the time of the gift, and whether he were permitted to take possession or not. But after delivery, the donor has no right of revocation when the gift is to a relation within the prohibited degrees. With regard to all others besides these he has the right of revocation, except that after delivery he cannot revoke of himself, and the revocation requires the decree of a judge or the consent of the donee. Previous to delivery, however, the donee can revoke the gift of himself, either in whole or in part.

How a gift may be revoked.

The words appropriate to revocation are these: 'I have revoked the gift,' or 'restored it to my own property,' or 'I have annulled' or 'dissolved it.' If, without using any such expression, the donee should sell the gift, or give it in pledge, or emancipate it, being a slave, or make him a *moodubbur*, there is no revocation. If he should say, 'When the beginning of this month comes, I have revoked,' the revocation would not be valid, because it can neither be suspended on a condition nor referred to a future time.

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Causes that prevent the revocation of gifts.

The causes that prevent revocation are of various kinds. Of these there is—1st. The loss of the thing given; for there is no means of having recourse for its value, since the contract was not for value. 2nd. The passing of it from the property of the donee, by whatever means that may be effected, as by sale, gift, or the like; or by his death, for what is established to an heir is different from what is established to an ancestor. 3rd. The death of the donor. 4th. An increase of the thing given, of such a nature as to be united to it; and it makes no difference whether the increase be in consequence of an act of the donee, or without such act, and whether it have issued from the thing itself, or be an accession to it. But it must be incorporated with the body of gift, and be an addition to its value, such as dyeing, sewing, porterage, or the like. Mere transfer from one place to another, when it adds to the value of a thing, and has occasioned expense is sufficient to prevent revocation, according to Aboo Huneefa and Moohummud. A separate increase does not prevent the revocation of a gift; nor does damage or loss sustained by the subject of gift, and the donee is not responsible for the loss. 5th. An exchange received for the gift prevents its revocation. 6th. So also a change in the subject of it, as grinding when it is wheat, baking when it is flour, and churning into butter when it is milk. 7th. The marriage relation prevents the revocation of gift; and it has that effect though one of the parties be a *Mooslim* and the other an infidel. And when one of married parties has made a gift to the other, it cannot be revoked, though the marriage should afterwards be dissolved. But if a man should make a gift to a stranger and then marry her, or a woman should make a gift to a stranger and then unite herself to him in marriage, the giver might recall the gift. 8th. Relationship within the forbidden degrees prevents the revocation of a gift, whether the relative be a *Mooslim* or an infidel; and there is, consequently, no revocation of gifts to fathers and mothers, how high soever, or children, how low soever; the children of sons and the children of daughters being in this respect

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alike. In the same manner there is no revocation of gifts to brothers and sisters, and paternal uncles and aunts. But where the prohibition is for some other cause than consanguinity it does not prevent revocation; as in the case of fathers and mothers, or brothers and sisters by fosterage, and of mothers of wives, step-sons, and the wives of sons, and husbands of daughters who are prohibited by affinity.

Examples of increase in the subjects of gift preventing its revocation.

When the subject of gift is a *hummam*, or bath, and the donee has converted it into a dwelling-house, or a house, and he has converted it into a bath, and the building is left in other respects as before, without any addition, the gift may be revoked. But if an addition is made to the buildings, or they are plastered with mortar or clay, or a door in them is shut up, or they are repaired, there is no longer any power to revoke the gift. When an addition has been made to the buildings, and it subsequently falls down, the power of revocation revives. If half a mansion be sold (by the donee) without partition, the gift may be revoked as to the remainder; or if no part of it be sold, the half of it may be resumed; for as the donor can revoke the whole of the gift, so he may revoke the half of it. If a slave were given as a boy, and he should grow to youth, manhood, and old age, and the donor should then seek to revoke the gift, the value of the slave being then less than it was at the time of the gift, he has no power to do so: for the right to revoke having dropped at the time of increase in value, does not revive. And if the subject of gift was a female, and she should grow to youth and adult age, there could be no revocation. The rule is the same with respect to the lower animals.

On revocation, the right of the donor revives as to the future.

When a female slave is given to her husband, the marriage is cancelled, and does not revive though the gift should be revoked, in the same way as a debt does not revive. On revocation of a gift the donor's property in the subject of it returns to him so far as regards the future, not as to the past. Thus, when a man has made a gift of a mansion and delivered it, and another mansion adjacent to it is sold, after which he revokes the gift, he

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has no claim to the second mansion under the right of pre-emption.

Donor's power of revocation, when lost by a gift by donee, revives on revocation by him.

When a man has given a slave to another, who has taken possession of him, and then given him to a third party, who has also taken possession, the first donor has no power to revoke either as against the first donee or as against the second; but if the first donee should revoke from the second, as he is entitled to do, the first donor may then revoke from him. Yet if the slave should return to the first donee by means of gift, alms, inheritance, bequest, purchase, or the like, the first donor would have no power to revoke his gift. Nor if the first donee had sold the slave, and he had been returned on his hands for a defect, could the first donor revoke his gift.

Gift of a debt cannot be revoked.

When a man gives a debt to his debtor, the gift is not revocable; but when he gives fruit on a tree, with permission to take possession, and it is taken, he may revoke the gift.

Revocation is a cancellation of the donee's right.

Revocation under a judge's decree is a cancellation, without any difference of opinion; but there is some difference as to revocation by mutual consent being so. The tendency of precedents, however, is in favour of its being a cancellation also. Thus, when one person has given a thing to another, who, after giving it to a third party, revokes the gift, the first donor is entitled to revoke also; but this could not be the case if the return to the first donee were a gift *de novo* by the second. Revocation being a cancellation, it follows that the thing given returns to the former state of property, and that the donor becomes again the proprietor without any necessity for taking possession anew. The thing given is also, after revocation of the gift, an *amanut*, or trust in the hands of the donee; so that if it should perish, he is not responsible for the loss. But when revocation is neither by a judge's decree nor by mutual consent, and the donee gives back the subject of the gift to the donor, and he accepts, he does not again become the proprietor of it till he has taken possession. When he does take possession, the gift by the donee comes into the place of a revocation by

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judge's decree or mutual consent, and the donee has no power to revoke it.

Until the judge's order to cancel a gift, the donee may dispose of it.

It is reported as from Aboo Yoosuf that until an order has been passed by a judge for cancelling a gift, the donee may use and dispose of the subject of it; but any such use or disposal after the judge has given his order is unlawful; and the opinions of Aboo Huneefa and Moohummud were to the same effect. If the subject of gift should perish in the hands of the donee after the passing of the judge's order, and previous to the donor's retaking possession, the donee is not responsible for the loss, unless possession had been demanded of him, and he had refused to give it. If, after a gift has been revoked, but before any decree of a judge, the donee should give the subject of it to the donor, and he takes possession, it comes into the place of a restoration by him, or a restoration by order of the judge.

Power of revocation cannot be abandoned.

A man has made a gift, and then said, 'I have dropped my right of revocation,' his right nevertheless does not drop. But if the right of revocation is compounded for something, the composition is valid, and the thing becomes an exchange, which causes the right of revocation to drop.

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CHAPTER V.

OF GIFTS TO MINORS.

A father may by gift make an unequal distribution among his children.

If a man in health, making gifts to his children, should desire to give to some of them more than to others, he may lawfully do so according to Aboo Huneefa, when the child, in whose favour the distribution is made, is superior to the others as regards religion; but when they are all the equal in this respect, it is abominable to make any distinction. According to Aboo Yoosuf, an unequal distribution may lawfully be made when there is no intention of injuring any of the children; and as much should be given to a daughter as to a son. The *futwa* is in accordance with this, and it is approved. But if a man in health should give the whole of his property to one child, it is lawful judicially, though he is sinful for so doing. And when a man has a profligate son, he should give him no more than may suffice for his maintenance, that he may not be aiding him in his wickedness. While, if he has a son given to learning instead of business, he may lawfully give more to him than to the rest.[1]

A gift by a parent to his child of a thing in his own possession is complete by the contract.

The gift of a father to his infant child is completed by the contract; and it makes no difference whether the subject of the gift be in his own hands, or in deposit with another. But if it be in the hands of an usurper, or of a pledgee, or of a tenant who has hired it, the gift is not lawful for want of possession. In like manner, as to gifts by a mother, when the thing given is in her own hands, and the father is dead without having appointed an exe-

[1] *See* case No. 1, chap. iv., *P. P. M. L.*, p. 197.

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cutor. And so also as to gifts by every other person who has the care of the child. When a father has given a mansion to his little son, in which there are goods belonging to himself, the gift is lawful and approved.

Who may take possession of a gift for one incompetent to take possession for himself.

The donee, when competent to take possession, has the right to take it. When he is a minor, or insane, the right to take possession for him belongs to his guardian, who is first his father, then his father's executor, then his grandfather, then his executor, and next the judge, and person appointed by him. It is alike whether the minor be in the family of any of these persons or not. If the father or his executor, or paternal grandfather or his executor, be absent at a precluding distance, possession may be taken for a minor by any person under whose power he may happen to be. And with regard to others besides the father and grandfather, such as the brother, paternal uncle, mother, and other relatives, they have all, on a favourable construction, the power to take possession of a gift for a minor when he is in their family. In like manner, the executors of all these have the like power, on a favourable construction, when the minor is in their family; and so, also, a stranger who nourishes and protects an orphan[1] who has none other besides himself, may lawfully take possession of a gift on his behalf, on a favourable construction. In all these cases, it is alike whether the minor have or have not understanding to know what taking possession is. But in all it is assumed that the father is dead, or, if alive, is absent at a precluding distance. For, if the father were alive and present, though there is no express authority on the subject, it would seem, from the case of the stranger, and orphan, that if possession were taken by any of the persons above-mentioned and the father were present, the possession would not be valid. When a young girl who is old enough for conjugal intercourse is living with her husband, and a gift is made to her, possession by herself

[1] *Yuteem.* The word is derived from *yutumu*—'he was alone or deprived of'—and does not necessarily imply that the parents are dead.

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or by him is lawful. And even when she is not old enough for such intercourse, possession taken for her by her husband is valid, if she be living under his power and protection. But if she is not living under his power and protection, possession taken by him on her behalf is not lawful, and her guardian should take possession of the gift. If a youth has understanding, and takes possession of a gift, it is lawful though his father be alive; and upon this point 'our' three masters were agreed. But not so if the youth be without understanding.

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CHAPTER VI.

OF THE EFFECT OF AN IWUZ, OR EXCHANGE IN GIFT.

Two kinds of *iwuz*.

THE *iwuz*, or exchange in gift, is of two kinds—one subsequent to the contract, the other stipulated for in it.[1]

Iwuz subsequent to the gift.

With regard to that which is subsequent to the contract, the subject may be considered under two heads: first, the conditions under which the exchanging is lawful, and the second gift becomes the *iwuz*, or exchange for the first; and second, the nature, or essential character of the exchanging.

Its conditions.

First, as to the conditions; and these are three:—1st. The *iwuz*, or exchange, must be distinctly opposed to the prior gift by words clearly expressive of such opposition, as, for instance, by saying, 'This is the *iwuz*,' or 'the *budul*,' or 'in place of, thy gift,' or 'I have made a donation of this for thy gift,' or 'have made it lawful to thee,' or 'established it to thee,' or words of similar import. So that if one should give a thing to another, and the donee should take possession, and then make a gift of something to the donor, without saying 'in *iwuz* of thy gift,' or using some other of the forms of expression above-mentioned, the second gift would not be an exchange for the first, but a new gift, and each of the parties would have the right to revoke. 2nd. The *iwuz* in a contract of gift should not be something that comes into the possession of the donee by means of the contract itself. So that if the donee should give in exchange for the

[1] In both kinds the *iwuz* is distinct from the gift, and there are two transactions; but in the case known in India as *heba-bil-iwuz*, there is only one transaction, *ab initio*, and it is properly a sale. See *ante*, p. 122.

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gift a part of the thing given, it would not be valid, and there would be no *iwuz*. But if such a change should take place in the thing given as would prevent a revocation of the gift, part of it may be made an *iwuz* for the remainder. And if two things are given by different contracts, and one of the two is given back as an exchange for the other, though there is some difference of opinion on the point, yet, according to Aboo Huneefa and Moohummud, it would be a good *iwuz*; and if one of them were given by way of gift, and the other as *sudukah*, and the *sudukah* were exchanged for the gift, it would be an *iwuz*, according to them all. 3rd. The *iwuz* must be secured to the giver; and if it be not secure to him, as, for instance, if a right be established to it while in his hands, it is no *iwuz*, and he may revoke the previous gift if the thing given be still subsisting in kind, undestroyed and without any increase for the better, or anything happening in it to prevent revocation. If it should have perished, or been destroyed by the donee, he is not responsible, any more than he would have been if such loss or destruction had taken place before the exchange. If a right be established to a part of the *iwuz*, the remainder is still an exchange for the whole gift; but the donor may, if he please, return what remains of the *iwuz* in his hands, and revoke the whole of his gift, if it be still in existence without any increase in its substance, and have not passed out of his property. As to the security of the thing given, that also is a condition of the exchanging; so that if a right be established in it, the donee under the original gift may revoke the *iwuz*, and if the right be to a half, he may revoke half of the *iwuz*, when the thing given is of such a nature as to admit of partition; and it matters not whether the *iwuz* itself have increased or diminished in price or in substance, he takes half the increase or the loss, as the case may be. This is when the subject of the gift, or the *iwuz*, is a thing that does not admit of partition, and a right is established in part of it; but when it admits of partition, and a right is established in part of one of them, the *iwuz* is void if the

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right be established in it; and in like manner the gift is void if the right be established in it; and when the *iwuz* is void, the gift may be revoked, and when the gift is void the *iwuz* may be revoked.

Nature of the transaction.

Second, as to the nature or essential character of the transaction. When the exchanging takes place subsequently to the gift, the *iwuz* is, without any difference of opinion between 'our' masters, a gift *ab initio*. So that it is valid where gift is valid, and void where gift is void, there being no difference between them except as to the dropping of the power of revocation in the case of the *iwuz*, while it is established in that of the gift. And after possession has been taken of the *iwuz*, the power to revoke drops also with respect to the gift.[1] So that neither party can reclaim from his fellow what he has become possessed of, whether the *iwuz* were given by the donee or by a stranger, with or without his direction. All the conditions of gift are applicable to the *iwuz*; and the transaction does not come within the meaning of a contract of *mooawuzut*, or mutual exchange, either in its inception or completion.[2] Hence, it is not exposed to *shoofâ*, or the right of pre-emption; nor can the thing given be rejected on either side on account of defect.

When the *iwuz* is stipulated for in the first gift.

The second kind of *iwuz* is that which is stipulated for in the contract of gift.[3] When a gift is made on condition of an *iwuz*, or exchange, all the conditions of gift attach to the *iwuz* in the beginning. So that it is not valid in *mooshââ* of anything that admits of partition. Property is not established in it before possession; and each of the parties may refuse delivery. But after mutual possession has been taken, the effect is that of sale. Hence, neither of the parties can recall what was his. *Shoofâ*, or the right of pre-emption, is established by the transaction; and each of the parties may return for a fault the thing

[1] *Doorr ool Mookhtar*, p. 637.

[2] This is the difference between it and the transaction known as *heba-bil-iwuz* in India, which is truly a contract of exchange.

[3] This is usually termed in India, *heba ba shurt ool iwuz*, or gift with a condition of exchange.

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of which he took possession. According to analogy, a gift on condition of an exchange ought to be a sale in its inception as well as in its completion. When a man gives a mansion to two men on condition of an *iwuz*, or exchange of a thousand *dirhems*, the transaction becomes a lawful sale after mutual possession.

Effect of the *iwuz* when partial, or given by a stranger.

If a person should give an *iwuz* for the whole of a gift, it would prevent revocation, whether the *iwuz* be much or little; if the *iwuz* be for part of the gift, the part for which there is no *iwuz* may be revoked, but not that part to which the *iwuz* is opposed. An *iwuz* made by a stranger is lawful, whether by the direction of the donee or not; and the stranger making it cannot have recourse to the donee, whether it was by his direction or not, unless the donee have said, 'Make an *iwuz* to such an one on my account on condition of my being responsible,' which would be the same as if he should say, 'Give this thy slave to such an one from me,' when the person directed would have no recourse against the person who gave the direction, unless he had said, 'on condition of my being responsible.' The general principle in cases of this kind is, that when anything is demandable of a person in *specie*, and is obligatory upon him, his direction to another to pay it is a cause of recourse against himself without any condition for responsibility; and that when a thing is not demandable from a person in *specie*, and is not obligatory on him, his direction to another to pay it is not a cause of recourse against him, unless his responsibility is made a condition of the payment.

An *iwuz* for a gift which the donor had no power to make does not render it valid.

When a *mazoon*, or licensed slave, makes a gift to a man who renders him something in exchange, each party may recall what is his own, and the gift is void. And, in like manner as to a gift by a father out of the property of his minor child, for which the donee makes an *iwuz*, or exchange. And when a person has given something to a minor, and his father makes an *iwuz* for it out of the minor's property, the exchanging is not lawful, though the gift were made on condition of an *iwuz*. A sick man gives to one in health a slave of the value of a thousand

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dirhems, having no other property besides, and the donee makes an *iwuz* for the gift, of which the sick man takes possession and then dies, the *iwuz* being still with him. If the *iwuz* is equal in value to two-thirds or more of the slave, the gift is valid; but if the *iwuz* be only half the value, the heirs may claim a sixth of the gift from the donee, though the *iwuz* were stipulated for in the original gift; and the donee may, if he please, return the whole gift, taking back his *iwuz*, or restore a sixth of the gift, and keep the remainder.

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CHAPTER VII.

OF THE EFFECT OF A CONDITION IN THE GIFT.

Gift and release do not admit of the option of stipulation.

WHEN a slave or a thing is given on a condition that the donee shall have an option for three days, the gift is lawful if confirmed by him before the separation of the parties; and if not confirmed by him till after they have separated, it is not lawful. But when a thing is given on a condition that the donor shall have an option for three days, the gift is valid, and the option void; because gift is not a binding contract, and therefore does not admit of the option of stipulation. A person says to another, 'I have released thee from my right against thee, on condition that I have an option,' the release is lawful, and the option void.

Distinction between a conditional gift and a gift with a condition.

A man to whom a thousand *dirhems* are due by another says to him, 'When the morrow has come the thousand is thine,' or 'thou art free from it,' or 'When thou hast paid one-half the property then thou art free from the remaining half,' or 'the remaining half is thine,' the gift is void.[1] But if he should say, 'I have released you on condition that you emancipate your slave,' or 'Thou art released on condition of thy emancipating him by my releasing thee,' and he should say, 'I have accepted,' or 'have emancipated him,' he would be released from the debt.

Gift is not invalidated by an invalid condition,

All 'our' masters are agreed that when one has made a gift and stipulated for a condition that is *fasid*, or invalid, the gift is valid and the condition void; as if one

[1] It has been already said (p. 515) that a gift cannot be suspended on a condition, and the same is true of a release (*Fut. Al.* vol. iv., pp. 553-4).

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should give another a female slave, and stipulate 'that he shall not sell her,' or 'shall make her an *oom-i-wulud*,' or 'shall sell her to such an one,' or 'restore her to the giver after a month,' the gift would be valid, and all the conditions void.[1] Or if one should give a mansion, or bestow it in alms, on condition 'that the donee shall restore some part of it,' or 'give some part of it in *iwuz*, or exchange,' the gift would be lawful and the condition void.[1] It is a general rule with regard to all contracts which require seisin, such as gift and pledge, that they are not invalidated by vitiating conditions.

but the condition is void.

A woman says to her husband, 'I have bestowed on thee in *sudukah*, or charity, the thousand I have against thee, on condition that thou wilt not marry,' and he accepts, but marries notwithstanding,—she, however, has no power to revoke the gift.[2] A wife gives her dower to her husband, on condition that he will put the business of every wife belonging to him in her hands, and he does not accept,—the approved doctrine is that the gift is valid without the acceptance of the debtor before he puts the business into her hands, and the release is past.[3] If he should not do so, the approved doctrine is that the dower reverts. So also if she should release him on condition 'that he will not beat her,' or 'will give her such a thing.' But if this were not a condition in the gift, the dower would not revert. When a man has said to his wife, 'Hast thou freed me from the dower, that I may give thee such a thing?' and she has freed him; after which the husband has refused to make her the gift, Nuseer has reported that the dower reverts to her as before. And it is stated in the *Book of Hujj*, that when

When the condition is not of that character, it is good.

[1] The conditions are all inconsistent with the absolute property conferred by gift, and would vitiate a contract of sale (*see M. L. S.*, p. 198).

[2] *Sudukah* being in its nature irrevocable (see *post*, chapter ix.), the donor cannot acquire a power to revoke by the non-performance by the donee of his engagement.

[3] See *ante*, p. 531. 'Is past,' that is, has taken effect, is not contingent.

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a woman has abandoned her dower to her husband, on condition of his performing the *hujj*, or pilgrimage to Mecca, with her, and he fails to do so, Moohummud Ben al Mookatil has said that the dower returns to her in its former condition. And Sudur Ash Shuheed has said that what has been stated by the other two has been adopted for the *futwa*.

Miscellaneous cases.

A woman says to her husband, 'You absent yourself much from me, but if you remain with me and will not absent yourself from me, I have given you the wall which is in such a place,' whereupon he remains with her for a while, but afterwards repudiates her. The case presents five aspects.[1] 1st. If it is a promise on her behalf, and no present gift, the wall does not belong to her husband.[2] 2nd. When she has actually given and made delivery to him, and he has promised to abide with her, the wall is the husband's;[3] but it would be otherwise if there were no delivery. 3rd. When she has made the gift on condition that he is to abide with her, and has made delivery to him and he has accepted: here also the wall belongs to the husband according to Sheikh Aboo'l Kasim, but according to Nuseer and Moohummud Ben Mookatil, the wall does not belong to the husband, and this opinion is approved.[4] 4th. When the wife has said, 'I have given you the wall, if you abide with me;' here also the wall does not belong to the husband.[5] 5th. When she has compounded with the husband on the terms that he is to abide with her, on the wall being a gift to him; and here in like manner it does not belong to him. A woman gave her dower to her husband that he might cut for her twice a year a piece of cloth, and the husband accepted, but allowed two

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[1] The sentence is rather ambiguous from the use of verbs in different tenses, and admits of various constructions.

[2] Because a promise is no conveyance of property.

[3] Because the gift is not suspended on a condition.

[4] No reliance is placed on the other opinion because she was not content except on the condition.

[5] Because the gift is suspended on a condition. All these reasons are from the *Fut. Ka. Kha.*, vol. iv., p. 196.

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years to pass without cutting for her a single piece, and Aboo Bukr al Fuzl said that if it were made a condition in the gift the dower would still remain a debt against him as before; but if it were not a condition in the gift, the dower would drop, and would not revive again after that. So also if the gift were on condition that he would treat her well, and he does not treat her well, the gift would be void. A woman says to her husband, 'I have granted you my *kabeen*, hold your hand from me;'[1] if he does not repudiate her, he is not freed from it.[2] A woman gives her dower to her husband on condition that he is to keep her, and not repudiate her, and the husband accepts; Aboo Bukr Ben al Fuzl has said that if no time is limited for the keeping, the dower does not revive against the husband, but that if a time is limited, and he repudiates her before the time, the dower remains against him as before. Aboo Jaafur being asked with regard to a husband who forbade his wife from going to her parents, she being sick at the time, and said to her, 'If you give me your dower, I will send you to your parents,' and the woman answered, 'I will do it,' and he brought witnesses to her, whereupon she gave him part of her dower, and bequeathed part of it to the poor or others, after which he refused to send her to her parents, and forbade her,—replied, the gift is void, because all this amounts to a compulsory gift.

Examples of contingent gifts.

A woman says to her sick husband, 'If you die of this sickness, you are released from my dower,' or 'my dower is on you as *sudukah*, or alms'—this is void because it is contingent and a suspension. A sick woman says to her husband, 'If I die of this my disease, my dower is to thee as alms,' or 'you are relieved of my dower,' and she does die of the disease, the gift is void, and the dower remains

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[1] *Chung.* Literally, your 'clutches.' The whole expression is Persian, and equivalent to a request for repudiation, *kabeen* being the common word in that language for dower.

[2] Because she has made her dower an *iwuz* for repudiation. *Fut. Ka. Kha.*, vol. iv., p. 195.

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due by the husband. When a woman is desirous that a husband who has repudiated her should marry her again, and the husband says, 'I will not marry you till you give me what is due to you by me,' and she gives her dower stipulating that he will marry her, the dower remains a debt against him whether he marry her or not, because she has made the property due to herself an exchange for marriage, and in marriage no exchange is incumbent on a wife. When a man says to his debtor, 'If you don't pay me what you owe me till you die, you are released,' it is void.[1] But if he should say, 'When I die, thou art released,' it would be lawful.[2] While if he say, 'If I die, then thou art free from this,' there is no release, for this is contingent, as when he has said, 'If thou enterest the house, thou art free from what I have against thee.' A man releases another from his debt that he may settle an important matter for him with the Sultan—he is not released, for this is a bribe.

[1] Because this is a suspension, and release does not admit of being suspended. *Fut. Ka. Kha.*, vol. iv., p. 196.

[2] Because it is a bequest (*ibid*).

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CHAPTER VIII.

OF GIFT BY THE SICK.

Gift in sickness is not a legacy, though valid only to the value of a third of the donor's property.

It is stated in the Asul that neither a gift nor a *sudukah*, or charitable disposal of property, by a sick person, is lawful, except when possession has been taken of the subjects of them; that, when such possession has been taken, they are both lawful, to the extent of one third part of the sick person's estate; and that if he should die without making delivery, they are both void. For the right understanding of this it is proper to observe, that a gift by a sick person is not a legacy, but a gift of contract, the restriction to a third of the estate being for the sake of the heirs, who have an inchoate right in it; and that being a gift of contract, it is necessarily subject to all the conditions of gift, among which is included the taking of possession before the death of the giver. If the subject of the gift be a mansion, and the donee takes possession of it, after which the donor dies without leaving any other property, the gift is lawful as to a third of the mansion, and the other two thirds of it must be restored to the heirs.[1] So also as to all other things, whether they do or do not admit of division. If a sick person should give a slave (being all his property) on condition of an *iwuz*, or exchange, for two thirds or more of his value, the gift is lawful; and if, for less than two thirds, the donee may, if he please, make up the *iwuz* to that amount, or restore the whole of the gift, and take

[1] The supervenient confusion arising from the right of the heirs not affecting the donee: *ante*, p. 525.

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back the *iwuz*. So also if he should make the *iwuz* (of his own accord) without any condition. When a sick man makes a gift of his slave, having no other property besides, and the donee sells him, after which the donor dies, the sale is valid; but the donee must account to the heirs for two thirds of the value. A sick person, having no other property than a slave, and being in debt to the amount of his value, makes a gift of him to a man who emancipates the slave before the death of the donor, the emancipation is lawful. But if the emancipation does not take place till after his death, it is not lawful.

It is valid as to the whole if he recovers; or even though he die, if the sickness were not death-illness. What is death-illness.

When a sick woman has given her dower to her husband, the gift is valid if she recovers from her illness; and even though she should die of that illness, yet if it were not a death-illness, the answer would be the same; but if it were a death-illness the gift would not be valid without the sanction of the heirs. As to the definition of a death-illness, it has been said, and this is approved for the *futwa*, that when the illness is such that it is highly probable that death will be the result, it is a death-illness, whether she has taken to her bed or not.[1] Aboo Leeth has said that it is 'when a man cannot pray standing, and we adopt this.'[2] A sick woman, having given her dower to her husband, then died, whereupon Aboo Jaafur said, that if, at the time of the gift, she were able to stand up for necessary occasions, and raise herself without assistance, she should be considered as one in health, and the gift is valid.[3] The most valid definition of death-illness is, that it is one which it is highly probable will issue fatally, whether, in the case of a man, it disables him from getting up for necessary avocations, out of his house or not, such as, for instance, when he is a *fukeeh*, or lawyer, from going to the *musjid*, or place of worship; and, when he is a merchant, from going to his shop; and whether, in the case of a woman, it does or does not

[1] The authority cited for the definition and what precedes it, is the *Moozmirat*.

[2] *Jowhurut-oon-Neyyerah*.

[3] *Fut. Ka. Kha*.

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disable her from necessary avocations within doors.[1] The lame, the paralytic, the consumptive,[2] and a person having a withered or palsied hand, when the malady is of long continuance, and there is no immediate apprehension of death, may make gifts of the whole of their property. But when a woman has been seized with the pains of labour, her acts in that state are valid only to a third of her property, unless she recovers, when they become lawful to the full amount. If she should give her dower to her husband while in labour, and should die during the *nifas* (or prescribed period for purification after child-birth), the gift would not be valid.

Miscellaneous cases of gift in death-illnesses.

A woman gives her dower to her husband during her death-illness, and he dies before her: she has no claim against him, because the release is valid till she dies. But if she should die of the same disease, her heirs may claim the dower. When a master in health has made a gift to his *oom-i-wulud*, it is not valid; and, in like manner, what he gives her in his sickness is not valid, and is not converted into a legacy. But if he should make a bequest of anything to her after his death, it would be valid. When a woman wishes to give her dower to her husband if she shall die, but otherwise that he shall remain responsible to her for it, the device is to buy from her husband a piece of cloth covered up in a towel, in exchange for her dower, and then if she should die, her option of inspection would be void; but if she should live, she can return the cloth under the option (and, of course, have back her dower).[3] The gift of dower to a dead husband is valid, on a favourable construction of law.[4]

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[1] I have added this definition from the *Doorr ool Mookhtar*, p. 246.

[2] *Muslool*: Participle passive from *sullu*, 'phthisi laboravit' (Freytag).

[3] See *M. L. S.*, p. 84. This would be a gift *mortis causâ*, and good in English law without any device, but not otherwise valid according to the Moohummudan, because it is contingent, death at that time being implied, which is uncertain.

[4] To release him from responsibility at the day of judgment.

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CHAPTER IX.

OF SUDUKAH,[1] OR CHARITY.

Distinction between *sudukah* and *heba*.

SUDUKAH is a partaker of conditions with *heba*, but differs from it in legal effect.[2] It therefore comes into the place of *heba* in respect of *moosháâ*, and what is not *moosháâ*, and in requiring possession. But there is no revocation of a *sudukah* after it has been completed; and it makes no difference whether it be bestowed on the rich or the poor, for it cannot be revoked in either case. When a man has bestowed a mansion in charity on another, he cannot revoke, whether the person on whom it has been bestowed is rich or poor. And if one should deliver a piece of cloth to another, intending it as charity, and the other should suppose it to have been delivered by way of deposit or commodate, and should wish to return it to him, it would not be lawful for him to receive it, because his property in it ceased when the other took possession of it. If, then, he should receive it, it would be incumbent on him to make restitution. Gift is not valid without verbal acceptance; but charity is valid without it, on a favourable construction, from a regard to custom.[3] An invalid *sudukah* is like an invalid *heba*. Yet, if one were to give a *sudukah* to two rich persons it would be lawful, even according to Aboo Huneefa by one report, which was the opinion of the other two; while if it were bestowed on two *fakeers*, or beggars, the *sudukah* would be valid according to them

[1] *Sudukut*, Quicquid datur Deo sacrum, ut pars opum:—*vide* et Eleemosyna (Freytag).

[2] *Inayah*, vol. iv., p. 43.

[3] Compare with p. 515, *ante*.

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all. A person makes a gift to *miskeens*,[1] or persons without any property, and delivers it to them—he has no power of revocation on a favourable construction, though he ought to have it by analogy. And when he gives to one who asks of him, or is needy, without saying expressly that it is in charity, he has no power to revoke, on a favourable construction. It is reported as from Aboo Yoosuf, that if one were to give a mansion to another on such terms that half is in charity and half as a gift, and he should take possession, the donor might revoke as to the gift, because each half was given separately, and confusion does not prevent revocation. When a man has said, 'I have given the income (*ghullut*) of this my mansion as a *sudukah* for *miskeen*, or indigent persons;' or has said, 'This my mansion is *sudukah* for indigent persons,' he is to be commanded while he lives to distribute it in charity; but if he should die before the distribution, the produce and the mansion would both belong to his heirs; and if while alive he should give the value in charity, it would be lawful.

What is included in a charitable gift of all one has.

When a person has said, 'What I have,' or 'What I am entitled to is in charity to the indigent,' this is to be understood as of the *mal* or property, subject to *zukat*, or poor's-rate, and includes everything liable to it, such as beasts, cash, merchandise, whether it amounts to a *nisab* or not, and whether the person be drowned in debt or not. *Ooshree*, or tithe land, is also included, according to Aboo Yoosuf, though not so according to Moohummud; and neither *khurajee* lands, nor *akár*, or lands covered with buildings, nor domestic slaves, nor household goods, nor clothes, nor armour in use, and the like, which are not liable to *zukat*, are included. He may also withhold his own food; no exact quantity being specified, because the quantity must vary, according to the number of his family.

Hullal, the son of John, has said in his treatise on

[1] For the distinction between *miskeen* and *fakeer*, see *ante*, p. 332, note.

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Distinction between *sudukah* and *wukf*, or appropriation.

wukf, or appropriation, that if one should say, 'My land is a *sudukah* for the indigent,' it does not become a *sudukah*, because the land is unknown. But if he should say, 'This my land is a *sudukah*,' and point it out, without specifying the boundaries, it would be a *sudukah*, because land is made sufficiently known when pointed out. And so also if he should specify its boundaries without pointing it out, the land is made sufficiently known. Such a *sudukah* would be a *tumleek*, or transfer of property, and not a *wukf*, or appropriation.

A *sudukah* by a father to his infant child is valid without saying, 'I take possession.'

A man being possessed of a mansion bestows it by way of *sudukah* on his little child, without saying, 'I have taken possession of it for him,' he then divests himself of the property, and his child, on arriving at puberty, adduces proof of what his father said,—the mansion is his.

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BOOK IX.[1]

OF WUKF, OR APPROPRIATION.

CHAPTER I.

DEFINITION, CONSTITUTION, CAUSE, LEGAL EFFECT, AND CONDITIONS OF WUKF; AND WORDS BY WHICH IT IS AND IS NOT COMPLETED.

Definition.

THE legal meaning of *wukf*,[2] or appropriation, according to Aboo Huneefa, is the detention of a specific thing in the ownership of the *wakif* or appropriator, and the devoting or appropriating of its profits or usufruct in charity on the poor, or other good objects,[3] in the manner of an *âreeut*, or commodate loan.[4] But not so as to be obligatory on

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[1] *Fut. Al.*, vol. ii., p. 454 *et seq.*

[2] The meaning of the word, as given in the dictionaries, is merely 'detaining or stopping.'

[3] Mr. Hamilton has unnecessarily restricted the legal meaning to appropriations of 'a pious or charitable nature' (*Hedaya*, vol. ii., note p. 334); and he has been followed by Sir William Macnaghten, who renders the word by 'endowments.' But it will be seen hereafter that the term is more comprehensive, and includes settlements on a person's self and children.

[4] 'In the manner of an *âreeut* or commodate loan.'—This does not mean that the profits are merely to be lent; but that the objects of the *wukf* are to have the same benefit from it as if the subject of it were lent to them in the manner of an *âreeut*, when they would have the use of it, or, in other words, its profits or usufruct for their own benefit so long as it remained in their possession.

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the appropriator; and he may revoke the appropriation or sell the subject of it. There are two ways, however, but only two, in which it may be made obligatory: one is by the order of the judge making it so, and the other by the use of words of bequest in its constitution, as by saying, 'I have bequeathed the produce of my mansion,' in which case also the appropriation becomes obligatory. According to the two disciples, *wukf* is the detention of a thing in the implied ownership of Almighty God, in such a manner that its profits may revert to or be applied for the benefit of mankind, and the appropriation is obligatory, so that the thing appropriated can neither be sold, nor given, nor inherited. In the Ayoon and Yutuma it is stated that the *futwa* is in conformity with the opinion of the two disciples.[1] The right of the appropriator abates, according to Aboo Huneefa, as soon as the judge has pronounced his decree, the way to obtain which is for the appropriator to deliver the subject of the *wukf* to the *mootuwulee*[2] or superintendent, and then to require it back from him on the ground of the appropriation not being obligatory; whereupon the judge may pronounce his decree that it shall be obligatory, and it becomes so accordingly. If the appropriator suspends the *wukf* on his death by saying, 'When I die I have appropriated my mansion to such purposes,' it is valid and obligatory to the extent of a third of his property, the excess (if any) being in abeyance till it is seen if there is any other property, or the heirs will allow the appropriation. If there be no other property, and the heirs do not allow the appropriation, the produce must then be divided into three parts, and one third set apart for the *wukf*, and the other two thirds for the heirs. If the suspension on death be made during death-illness, the effect is the same as if it were made in health. As the right of the appropriator

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[1] The *Hidayah*, as usual, gives the arguments on both sides, without deciding in favour of either. Translation, vol. ii., p. 335.

[2] Derivative from *wula*, 'præfuit rei' (Freytag), and the common title in India for the person to whom the care of a *wukf* is committed.

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ceases, in the opinion of Aboo Yoosuf and Moohummud (without the order of a judge), it does so, according to the former, on his merely speaking the word, but, according to the latter, it does not cease till the appointment of a *wulee*,[1] or governor, and the delivery of the property to him. The opinions of the learned seem to be nearly balanced between them, two authorities declaring that the *futwa* is with Aboo Yoosuf, while two more allege that it is with Moohummud.[2] Aboo Yoosuf also maintained that the *wukf* of a *moosháâ* is valid, while Moohummud was of a contrary opinion.[3] So also the appointment of oneself as *mootuwulee* is valid, according to Aboo Yoosuf, and apparently conformable to the doctrines of the sect,[4] but invalid according to Moohummud; and, in like manner, a condition on the part of the appropriator, that he shall have the power of exchanging the land for other land, is valid according to Aboo Yoosuf, on a favourable construction of law, and the *futwa* is in accordance with his opinion. When the property has passed out of the appropriator, whether by decree of the judge, according to Aboo Huneefa, or by the mere appropriation, according to Aboo Yoosuf, or by the appropriation and delivery, according to Moohummud, it does not enter into the property of the persons for whose benefit the appropriation is made.

The pillars of *wukf* are special words declaratory of the appropriation, such as 'I have given this my land,' or 'bequeathed it as an appropriated and perpetual *sudukah* (or charity).' Its cause or motive is a 'seeking for nearness.'[5] And its legal effect, according to the two disciples, 'an abatement of the appropriator's right of property in

Constitution.

Cause.

Legal effect.

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[1] Adjective, derived from *wula*; for which see last note.

[2] Decisions are both ways. And see *post*, p. 601.

[3] According to the law officers of the S. D. A. of Calcutta (*Reports*, vol. i., p. 214), 'the whole series of *futawa*, or expositions of the law, coincide with Aboo Yoosuf on this point.' And see *post*, p. 573.

[4] See *post*, p. 601.

[5] To Almighty God, is, I think, intended. See *Hidayah*, vol. ii., p. 895, where it is said that, according to Aboo Yoosuf, that is the design of *wukf*. See *post*, p. 621.

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the thing appropriated in favour of Almighty God,' and, according to Aboo Huneefa, 'a detaining of it in the ownership of the appropriator, but without the power of alienation,' and 'a bestowing of its produce in charity.'

Conditions: 1. Understanding and puberty. 2. Freedom.

Among the conditions of *wukf* are understanding and puberty on the part of the appropriator; and an appropriation by a boy or insane person is not valid. Freedom is also a condition; but not so *Islam*. And when a *zimmee* appropriates his land to his child and his *nusl*,[1] or descendants, and ultimately to the poor, the appropriation is lawful, and the produce may lawfully be distributed among poor *Mooslims* and *zimmees*. If he were to confine the distribution to poor *zimmees*, that also would be lawful, and the distribution might be made among Christians, Jews, and *mujoosees*, unless one particular class were indicated; when, if the superintendents should distribute to any other, they would be responsible, though 'we' commonly say that all infidels are of one religion. Even though he should make the *wukf* to his son and his descendants, and then to the poor, on condition that if any of his children become *Mooslims* they shall be excluded from the charity, the condition would be binding; and so also if he should say, 'Whoever turns to any other religion than the Christian is excluded,' regard would be paid to the condition. It is stated in the *futawa* of Aboo Leeth, that when a Christian makes a settlement (*wukf*) upon his children, and his children's children, for ever, so long as there are any descendants, or makes the ultimate destination to the poor, as is customary, and some of the children become *Mooslim*, they are, nevertheless, to receive.

3. That there be some connection between the appropriator and the objects of the *wukf*.

It is a further condition that there be a nearness, that is, some relation between the appropriator and the objects of the appropriation; and appropriation by a *Mooslim* or a *zimmee* for a temple, or a church, or for the poor of the enemy, is not valid. If a *zimmee* should appropriate his mansion for a temple, a church, or a house of fire, it would

[1] For the exact meaning of this word, see *post*, p. 582.

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be void;[1] and, in like manner, if it were for repairing them, or the supply of oil for their lamps.[2] But if he should say for lighting or repairing the holy house,[3] it would be lawful; or if he should say, 'Buy a slave with it and emancipate him every year,' it would be lawful, as conditioned; and if he should say, 'Pass its produce to such a temple, and, if the temple should be ruined, the produce is for the poor,' the produce is to be applied to the poor, and nothing to be bestowed on the temple. If the words were generally 'for good purposes,' the building of temples and fire-houses and charity to the poor being all good in his estimation, 'I' would sanction the charity, but negative the others.[4] If he should direct the produce to be distributed among his neighbours, he having *Mooslims*, and Christians, and Jews, and *mujoosees* for neighbours, with an ultimate destination to the poor, the appropriation would be lawful, and the produce should be distributed among his *Mooslim*, Christian, and other neighbours. And if the *zimmee* should say, 'Give its produce for shrouds for the dead, and digging their graves,' it should be expended in providing shrouds for their own dead, and in digging the graves of their poor. But if a *zimmee* should give his mansion as a *musjid*, or place of worship, for Mussulmans, and construct it as they are accustomed to do, and permit them to pray in it, and they should pray in it, and he should then die, it would become the inheritance of his heirs, according to all opinions.[5] And if the *zimmee* should make his mansion

[1] *Zimmees*, though allowed to retain their old places of worship, are forbidden to erect any new ones in Mussulman cities.—*Fut. Al.*, vol. ii., p. 350.

[2] The reason of this is not so apparent, as *zimmees* are allowed to rebuild their old places of worship when they fall down.—*Fut. Al.*, vol. ii., p. 351.

[3] *Beit-ool-Mookuddus*; usually applied to Jerusalem, which is an object of veneration to Mussulmans as well as to Jews.

[4] Charitable purposes being near to the heart of all good persons. *Havee* is the authority cited; and the *I* probably means the author himself.

[5] There being no relation between him and the object.

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a temple, or a church, or a house of fire, while he is in a state of health, and should then die, it would be the inheritance of his heirs. When an enemy comes under protection into the *Dar-ool-Islam*, and makes an appropriation, it is lawful, in the same way as it is lawful for a *zimmee* to do so.

4. The subject of the *wukf* must belong to the appropriator at the time of making it.

It is also a condition that the thing appropriated be the appropriator's property at the time of the appropriation; so that, if one were to usurp a piece of land, appropriate, and then purchase it from the owner, and pay the price, or compound with him for other property, which is actually delivered up, it would not be a *wukf*. When a man makes an appropriation for certain good purposes of land belonging to another, and then becomes the proprietor of it, the *wukf* is not lawful, but it would be so if it had been allowed by the proprietor. And if a bequest were made of land of which the legatee immediately makes a *wukf*, after which the testator dies, the land is not *wukf*; or if one should purchase land subject to an option to the seller and then appropriate it, after which the sale is confirmed by the seller, the *wukf* would not be lawful. Otherwise if the option were to the purchaser. And if a donee of land should make an appropriation of it before taking possession, and should then take possession, the *wukf* would not be valid. Yet, if possession were taken of land, given by an invalid gift, and it were then made a *wukf*, it would be lawful, the donee being responsible for its value;[1] and if one should purchase by an invalid sale, take possession, and then make an appropriation of the subject of sale in favour of the poor, the *wukf* would be lawful, subject to the like responsibility for its value to the seller: but if the appropriation were made before taking possession, it would not be lawful. When a man buys land by a lawful sale, and makes an appropriation of it before taking

[1] If the gift were revoked. His property in it must therefore be established by the possession (see *ante*, p. 526), or the *wukf* would not be lawful.

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possession and paying the price, the matter is in suspense until he pays the price and takes possession, when the *wukf* is lawful; but if he die without leaving any property, the land is to be sold, and the *wukf* is void. And if a right is established in the property, or it is claimed by a *shufee*, under his right of pre-emption, after the purchase has been made, the *wukf* is void.

Some consequences of this condition.

It is a branch or consequence of property being a condition, that the appropriation of *iktáát*,[1] or concessions, is not lawful, except when the concession is of waste land, or of land belonging to the *imam* himself, which he has granted to the person. Nor is the *wukf* of *houz* land in the possession of the *imam* lawful, for it is not his property. And by *houz* is to be understood land which the owner is unable to cultivate and pay its *khuraj*, or land-tax, and has surrendered it to the *imam* that the yearly profits may be applied in payment of the *khuraj*. In like manner an appropriation made by an apostate during his apostasy is unlawful; that is, if he is slain for his apostasy, or dies in it, or takes refuge in the enemy's country, and the fact of his flight is judicially declared; for in all these cases his right of property is suspended. But if he should return to the faith the appropriation would be valid, that is, it would revive; and an appropriation made by a female apostate is valid, because she is not liable to be slain. It is not necessary that there should be an entire freedom from the rights of other parties, as, for instance, in cases of pledge and lease. So that if one were to give a lease of his land, and then to make a *wukf* of it before the expiration of the term, the *wukf* would be binding according to its conditions, but the lease would not be void; and on the expiration of the term the land would revert to the purposes to which it was appropriated. In like manner, if a man should pledge his land, and then appropriate it before redeeming it from the pledge, the land would not be withdrawn from the pledge; and if it

Qualifications of it.

[1] *Agri, etc. qui militibus in feudum dantur.* (Freytag). And see Introductory Essay to 'Land Tax of India,' second edition, p. 24.

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should remain for years in the hands of the pledgee, and then be redeemed, it would revert to the uses for which it was appropriated. Even though the pledgor should die before the redemption, yet if he leave enough to redeem the land, it is to be redeemed, and the *wukf* is obligatory. But if he should not leave enough for that purpose, the land may be sold, and the *wukf* is void. In the case of a lease, when either of the contracting parties dies, it is void, and the land immediately becomes *wukf*.

5. Condition—that the appropriator is not under inhibition.

6. That there is no uncertainty in the subject of the *wukf*.

It is a further condition that the party making the appropriation is not under inhibition at the time, either for facility of disposition, or debt. The absence of uncertainty is also required; and if a person were to appropriate anything out of his land without naming it, the appropriation would be void; though if it were of the whole of his share, without naming the portion, it would be lawful on a favourable construction. A man makes a *wukf* of his land on which there are trees, excepting the trees, —it is not lawful; because the trees being excepted, with their sites, what enters within the *wukf* is unknown. It is also a condition that the appropriation be at once complete, and not suspended on anything; as if one should say, 'If my son arrives, my mansion is a charity appropriated to the poor,' and the son should arrive, the mansion does not become *wukf*. And if one were to say, 'This my land is charity if such an one please,' and the person referred to should indicate his pleasure, still the *wukf* would be void. But when one has said, 'If this mansion be my property it is appropriated as charity,' the appropriation is valid if the mansion actually be his property at the time of speaking; for the suspension is here on a condition that is actually fulfilled, and there is no contingency. A man loses his property, and says, 'If I find it, by God, I will make a *wukf* of my land,' and he finds the property, it is incumbent on him to make a *wukf* of his land, for the benefit of those to whom it is lawful for him to pay *zukat*, or poor's-rate; and if he should make it for those to whom it is not lawful for him to pay *zukat*, the *wukf* would not be valid, nor he be released from his vow.

7. That the *wukf* is not contingent.

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If he should say, 'When such an one arrives,' or 'If I speak to such an one, this my land is charity,' it is obligatory, being in the nature of an oath and a vow; and if the condition happen it is obligatory on him to bestow his land in charity, but this is not an appropriation. When a man says, 'If I die of this my disease I have made this my land *wukf*,' it is not valid, whether he die or recover; but if he should say, 'If I die of this my disease, make this my land *wukf*,' it is lawful. The difference is, that the latter expressions amount to a conditional appointment of an agent, which is lawful. It is a further condition that there be no stipulation in the *wukf* for a sale of the property and expenditure of the price on the appropriator's necessities; and if there be so, the *wukf* is not valid. Also that no option be annexed to it; for if one should make an appropriation on condition that he is to have an option, it would not be valid, according to Moohummud, whether the time be known or not; and though the condition were cancelled, the *wukf* would not become lawful in his opinion. Aboo Yoosuf, however, maintained that a condition of option in favour of the appropriator for three days is valid. And they were both agreed with regard to the *wukf* of a *musjid* made on the condition of the appropriator's having an option, that the *wukf* would be lawful and the option void. Perpetuity is also among the conditions of *wukf*, according to all opinions; though, according to Aboo Yoosuf, the mention of it is not a condition, and this is correct. A man appropriates his mansion for a day, a month, or any specified time, without further addition,—the *wukf* is valid and perpetual. But if he should say, 'This my land is a *sudukah* appropriated for a month, and when the month has expired the *wukf* is void,' the *wukf* would be void immediately, according to Hullal; because perpetuity being a condition, limitation to a particular time is not lawful. If one should say, 'This my land is a *sudukah*, appropriated after my death for a year,' without further addition, the appropriation would be lawful in perpetuity for the benefit of the poor, for the words have the meaning

8. That there be no reservation of a power to sell.

9. That the *wukf* is free from option.

10. Perpetuity is a necessary condition.

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of a bequest. And if one should say, 'This my land is a *sudukah*, appropriated to such an one after my death for a year, and when the year has expired the appropriation is void,' it would be a bequest after his death to the person referred to for a year, and then it would become a legacy to the poor, and its produce would be distributed among them. But if he should say, 'My land is appropriated to such an one for a year after my death,' without further addition, the produce would be to him for a year, and then it would revert to the heirs.

11. The ultimate end must be one that cannot fail.

It is further a condition, according to Aboo Huneefa and Moohummud, that the ultimate destination to which the rent or produce is to be applied is one that can never be cut off or fail, and unless such be mentioned in the *wukf*, it is not valid, according to them. But according to Aboo Yoosuf, the mention of it is not a condition.[1] Nay, the *wukf* is valid, in his opinion, though a purpose is mentioned which is actually cut off or fails; for, in that case, the rent or produce would revert to the poor, which must be supposed to be the appropriator's design, though he should fail to mention it. Further, it is required that the subject of the *wukf* be either *âkâr*,[2] or a mansion. So that the *wukf* of anything that is movable, except beasts of burden[3] and arms, is not valid.

Words by which Wukf is and is not completed.

Effect and meaning of the word *sudukah* combined with *wukf* &c.

When a person has said, 'This my land is a *sudukah*, or charity, freed and perpetual, during my life and after my death,' or 'This my land is a *sudukah*, appropriated, detained,[4] and perpetual, during my life and after my death,' or 'This my land is a *sudukah*, detained, and per-

[1] See next page, where the opinion of Aboo Yoosuf is said to be approved.

[2] For the exact meaning of this word, see *ante*, p. 476.

[3] Kirââ, which, according to Surukhsee, comprehends horses, mules, asses, camels, bulls, on which burdens are laid.—*Fut. Al.*, vol. iii., p. 331.

[4] *Mowkoof, muhboos*, participles passive of *wukf* and *hoobs*.

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petual during my life and after my death,' the land becomes a *wukf*, lawful and obligatory for the benefit of the poor, according to all opinions. And if he should say, 'a *sudukah* appropriated and perpetual,' it would be lawful, according to the generality of 'our' learned men; or if he should say, 'a *sudukah* appropriated,' or 'a *sudukah* detained,' without saying 'perpetual,' the land would become a *wukf* according to all who consider appropriation lawful, because a perpetual *sudukah* is established which does not admit of cancellation. The words, 'This my land is a *sudukah*, appropriated to what is good,' or 'good purposes,' also amount to a *wukf*.[1] Though no mention be made of *sudukah*, yet if *wukf* is mentioned, as by a person's saying, 'This my land is *wukf*,' or, 'I have made this my land *wukf*,' or 'appropriated,' the land would be a *wukf* for the poor, according to Aboo Yoosuf. And Sudur ash Shuheed and the Sheikhs of Bulkh have said, 'Decrees are given on the opinion of Aboo Yoosuf, and we decree according to it;' also, from 'regard to custom.' And if he should say, 'It is appropriated to Almighty God for ever,' it would be lawful without the word *sudukah*, and would be a *wukf* for the poor. The word '*wukf*' alone, or in combination with *hoobs*, establishes a *wukf*, according to the approved opinion, which is that of Aboo Yoosuf. If one should say, 'I have made this my land prohibited,' or 'it is prohibited,' that would be the same in the opinion of Aboo Yoosuf, according to Aboo Jaafur, as if he had said 'appropriated.' If a person should say, 'This my land is appropriated for such an one,' or 'on my son,' or 'the poor of my kindred, being good persons,' or 'orphans, and the appropriation of it is not to be reversed,' it would be no *wukf*, according to Moohummud, because it is for a purpose that may be cut off or fail, and is not perpetual; but it would be a *wukf*, according to Aboo Yoosuf, because the making of it perpetual is not a condition with him. If one should say,

Effect of the word *wukf* without *sudukah*.

Wukf is sufficient of itself.

[1] The benefit of the poor being implied in the word *sudukah*, and an object that can never fail, as there always will be poor in the land.

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'My land,' or 'my mansion is a *sudukah* appropriated for such an one,' or 'the children of such an one,' they would be entitled to the produce while they lived, and after their decease it would go to the poor. If one should say, 'My land is *sudukah* for God,' or 'appropriated to Almighty God,' it would become *wukf*. So also if he were to say, 'My land is appropriated for a good purpose,' it would be as lawful as if he had said, 'a *sudukah* appropriated.'

Particular cases where other expressions suffice.

When a person has said, 'This my land is for a way,' and he is in a city where such expressions are commonly known to intend *wukf*, the land becomes *wukf*. If the expressions are not known to have that meaning, he should be called on to explain; and if he say that he meant *wukf*, they are to be applied according to his intention. If he say that he meant *sudukah*, or had no particular meaning, they are to be taken as a vow, and the land or its price should be given in charity. A man says in sickness, 'Buy out of the produce of this my mansion every month ten *dirhems*' worth of bread, and distribute it among the poor,' the mansion becomes *wukf*. If he should say, 'I have appropriated after my death,' or, 'I bequeath that it may be appropriated after my death,' it would be a valid *wukf* out of the third of his estate.

Distinction between *wukf* and a vow.

A man says, 'This my land is *sudukah*;' this is a *nuzr* or vow to bestow in charity; and if he bestow the specific thing or its price, it is lawful. And if he say, 'I have made a *sudukah* of this my land on the poor,' there is no *wukf*, but a vow which obliges him to bestow the specific thing or its value; and if he do so he is absolved from his vow; but if not, the land may be inherited from him, and the judge cannot compel him to apply it in charity, for what he has said is in the place of a vow. Nor if he should say, 'This my land is *sudukah* for good purposes,' would this be a *wukf*. Nay, it would be a vow. And if the words were, 'I have given the produce of this my mansion to the poor,' it would be a vow to give the produce in charity; or if the words were, 'I have given this my mansion to the poor,' it would be a vow to give the mansion itself. And if he should say, '*Sudukah* not to

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be sold,' it would be a vow of charity, not a *wukf*. But if he were to add, 'not to be given, and not to be inherited,' it would be a *wukf* for the poor.[1]

[1] Buhr oor Ráik, and see *Reports S. D. A. Calcutta*, vol. ii., p. 110.

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CHAPTER II.

OF THE PROPER SUBJECTS OF APPROPRIATION; OR, OF WHAT THINGS APPROPRIATIONS ARE AND ARE NOT LAWFUL.

A *wukf* of immovable property with the movables attached to it is lawful.

AN appropriation of *âkâr*[1] is lawful, as of lands, mansions, shops; so also of every movable that may be an accessory to it; as when a man has appropriated his land with its slaves, cattle, and implements of husbandry. But when a person appropriates his land with the slaves and cattle at work thereon, he ought to mention them, and specify their number; and should further make it a condition that they are to be maintained out of the produce; though if he fail to do so, they are to be maintained notwithstanding. But when their maintenance is made an express condition, it is to be continued as long as they live, though they should be sick and disabled from working, unless it be added, 'for working on the land.' In that case none of the produce is to be applied for the maintenance of such as are disabled from working; but a slave is to be sold in such circumstances, and another bought with the price, or with some addition to it out of the produce, if necessary. The same rule is to be observed with regard to cattle and implements of husbandry which have been appropriated with land, when they become useless; and the superintendents of the *wukf* are to act accordingly.

What unattached movables may law-

With regard to movables, when designedly appropriated, if they are beasts of burden or weapons of war, the *wukf* of them is lawful. As to other things than

[1] Strictly speaking, *âkâr* means land built upon, but here it comprehends arable lands also.

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these, if they are such as it is not the custom to appropriate, the *wukf* of them is unlawful. Where, again, they are such as it is customary to appropriate, as Korans for instance, the *wukf* of them is lawful according to Moohummud, whose opinion is approved by the great body of the learned, and has been adopted for the *futwa*. When Korans are appropriated for the use of the people of a particular *musjid*, or for the *musjid*, the *wukf* is lawful, and they are to be read in the *musjid*. There is some difference of opinion as to other books, but Aboo Leeth held the *wukf* of them to be lawful, and the *futwa* is to that effect.

fully be made the subject of *wukf*.

The appropriation of things from which advantage cannot be derived without destroying them, such as gold and silver, or eatables and drinkables, is not lawful according to the generality of lawyers; but by gold and silver are to be understood *deenars* and *dirhems*, or what is not ornament. And if one should make an appropriation of *dirhems*, or things estimated by measure, or clothes, it would not be lawful. But it is said that in places where this is customary, decrees are given in favour of the legality of the appropriation; and if it be asked how can that be? it is answered that the *dirhems* may be lent to the poor and taken back again,[1] or given in *moozarubut*, and the profit laid out in charity; and wheat may be lent to the poor to sow and then taken from them, and clothes lent to them to wear when necessary, and then taken back.

Things which are consumed in using, cannot be made the subject of *wukf*.

[1] Without interest is implied; as otherwise it would be an exchange of commodities estimated by weight for others of the same kind with an excess, which is *reba*, or usury, and unlawful (*M. L. S.*, p. 163). If the money were laid out in the purchase of government securities, or the like, and the interest or dividends applied to the purposes of the *wukf*, it does not appear to me that the objection would apply, as in the buying and selling of these there is no exchange of things of the same kind; and it is by no means uncommon for Mussulmans in India to take interest in that way.

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Of what is included in an Appropriation without express mention, and what is not so included.

Buildings and trees included in a *wukf* of land.

Khusaf has mentioned in his book on *Wukf*, that when a man in good health has made an appropriation of his land for specified purposes, and after these for the poor, the buildings and the palm and other trees on the land are included in the *wukf*.

But fruit on trees not included in a *wukf* of them.

He has also mentioned that fruit is not included in an appropriation of trees; and most of 'our' sheikhs are of that opinion, and it is correct. And if one should say, 'I have appropriated this my land as a *sudukah*, with its rights and all that is in it and of it,' and there happens to be at the time fruit on the trees, he ought to bestow the fruit in charity on the poor, though not by way of *wukf*, but by virtue of his vow, on a favourable construction, and what is subsequently produced is to be applied to the purposes specified in the *wukf*. And if he should say, 'My land is appropriated as a *sudukah* after my death, to the end that what produce God may cause to come out of it shall be to the servants of God,' and then dies leaving fruit actually on the trees, the fruit does not enter into the bequest, by virtue of the *wukf*.

Nor crops in a *wukf* of land.

When land is appropriated which has been sown, the growth is not included, whether it have any value or not. Canes and other plants that are cut annually are not included, but such as are cut biennially are included in a *wukf* of the land.

Fixtures and rights of water and way included in the *wukf* of an estate.

Mills in a field (*zuyut*), whether water or hand mills, and Persian wheels and buckets used for raising water, are included in an appropriation of it. When a man has appropriated his land without mentioning a right of water or way, both are included on a favourable construction, because land is not appropriated except on account of what it will produce, and for that purpose both are required.

What is included in the *wukf* of a mansion.

When a mansion has been appropriated without mentioning that the mansion is with all its rights, and everything small or great belonging to it, or in or of it, everything that would be included in the sale of it is included in the

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wukf.[1] So also in the *wukf* of shops, everything is included that would be included in the sale of them.

Of the Appropriation of Mooshââ.

Wukf of undivided property is lawful.

Confusion in things that do not admit of partition does not prevent the validity of a *wukf*; and on this point there is no difference of opinion, for the *wukf* of half a bath is lawful, though it be confused. But the *wukf* of an undivided share in a thing that admits of partition is not lawful according to Moohummud, whose opinion has been adopted by the Sheikhs of Bookhara. The moderns, however, decide according to the opinion of Aboo Yoosuf, who said that it was lawful; and that is approved. Both doctors agreed in negativing the *wukf* of a *mooshââ* for a *musjid* or a tomb, whether the property be susceptible of division or not. And when the judge has given his decree for the validity of a *wukf* of *mooshââ*, his decree is operative, as in all other matters on which there is a difference of opinion. Then if the property be divisible, and any of the parties should after the decree of validity demand a partition of the property, it is not to be divided according to Aboo Huneefa, but in the opinion of the other two a division should be made. But they were all agreed that if the whole of a thing be appropriated, and the parties desire a partition, it would not be lawful.

Proper party with whom to make a division.

When one has appropriated his share in land held in joint ownership, the person with whom a partition is to be made is the partner, and, after his death, his executor. And when a person has appropriated half of his own land, the proper party to make a partition is the judge; or if he sell his remaining share, the purchaser may make the partition, and the seller may then purchase back the share from him.

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[1] *M. L. S.*, p. 49 *et seq.*

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CHAPTER III.

OF THE PROPER OBJECTS OF APPROPRIATION.[1]

SECTION FIRST.

Of Disbursements, and the purposes for which Property may be appropriated.

Repairs are to be made out of the income of the *wukf*.

THE income of a *wukf* is to be expended in the first place on necessary repairs, whether the appropriator has made it a condition or not; and next, if nothing else has been specified, on such things as are nearest or most essential to the general purpose of the appropriation—as, for instance, in providing an *imam* for a musjid, or place of worship, and a professor for a Mudrussah, or college. But if anything else has been specified, the income must be applied to that immediately after the repairs. If a person should say, 'I have given the produce to such an one for a year or for two years, and after that to the poor,' and should make it a condition that the repairs are to be made out of the produce, the repairs are to be postponed to the right of the person, unless the postponement of them should be for the manifest injury of the *wukf*, in which case the repairs must first be made. If one should appropriate his mansion for the residence of his child, the repairs are to be made by the person who has the right of residence; and if he refuse, or is poor, the *hakim*,[2] or

[1] *Musarif*, pl. of *musruf*, disbursement, or the place of disbursing.

[2] Active participle of *hukumu*, 'he ordered,' and therefore applicable to any person giving orders, as a judge, ruler or magistrate, by

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judge, is to let the mansion, and to make the repairs out of the rent; and when these have been completed, he should restore it to the person entitled to reside in it. But that person cannot be compelled to make the repairs, nor is he at liberty to let the mansion. If any part of the buildings of the *wukf* should fall down, the *hakim* should use the materials for repairs, if any are required, and if not, preserve them for a future occasion; or if there is any good objection to his doing so he may sell them, and apply the price in making repairs when required.

Lawful and unlawful objects of *wukf*.

An appropriation for the kindred of the Prophet is lawful, according to the most approved opinion. An appropriation for the rich alone is not lawful. An appropriation for travellers is lawful; but it is to be applied to the poor among them, exclusively of the rich. And if one should say, 'to perform the *hujj* every year with the produce,' or 'to bestow every year in charity instead of my sins of omission,' or 'to pay my debts,' it would be lawful, if the ultimate destination were perpetuity for the poor. So, also, if he should say, 'My land is a *sudukah* appropriated for *jihad*, or religious wars,' or 'shrouds for the dead,' or 'digging their graves,' it would be lawful. But if he should say, 'My land is a *sudukah* appropriated to Almighty God for mankind for ever,' or 'for the children of Adam,' or 'for the people of Baghdad, and when they fail for the indigent,' Khusaf has reported that the *wukf* would be void. So also with regard to appropriations for the paralyzed and the blind, he has said in one place that they are void, but in another place that the produce is for the indigent, and not for the paralyzed and blind; and in like manner, that an appropriation for reading the Koran and for lawyers is void. In the Book of Wukf by Hullal, it is stated that an appropriation for the paralyzed is valid, and should be applied to the poor

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which last word Mr. Hamilton renders it in this place. By the compilers of the *Fut. Alum.* it is generally used, I think, as a synonym for *kazee*, or judge, and Freytag gives this as the first meaning of the word.

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among them, exclusively of the rich. 'Our' sheikhs have said that an appropriation for the benefit of a teacher in a *musjid*, who instructs the youth there, is not lawful; but some of them have said that it is lawful; and Nusfee used to say, that by analogy to this case, an appropriation for the students of such a place, without any distinction in favour of the poor among them, is lawful. In a *wukf* for the masters of Tradition, followers of Shafeï are not included, for they do not seek for tradition, but Hanifites are included, for they do seek for tradition.[1] A man gives his land or his house as an appropriation for every *moouzzin*, or caller to prayers, or every *imam* who may officiate in such a *musjid*; but Al Zahid has said that such an appropriation is not lawful, and that even though the *moouzzin* be poor, it is not lawful. The appropriation of an estate for those who may read at a tomb is not valid. An appropriation for *Soofees* is not lawful according to some; but others have said that it is lawful, and that the produce is to be expended on the poor among them. This opinion is correct.

Section Second.

Of a Wukf or Settlement by a Person on Himself and his Children and his Nusl.

A *wukf* on one's self and another in succession is lawful.

A man says, 'My land is a *sudukah* settled[2] on myself.' Such an appropriation is lawful, according to what is approved. So also, if he should say, 'I have settled it on myself, and after me on such an one, and then upon the poor,' it would be lawful according to Aboo Yoosuf. And if one should say, 'My land is settled on such an one, and after him upon me,' or should say, 'upon me and upon

[1] This account of the followers of Shafeï does not tally with what is said in the Preliminary Discourse (p. xxvii) to Mr. Hamilton's translation of the Hidayah.

[2] Though I use the words 'settlement' and 'settled' in this section as being more appropriate to the subject of the *wukf*, the original words are the same as those generally translated 'appropriation' and 'appropriated.'

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such an one,' or 'upon my slave and upon such an one,' the approved opinion is that it would be valid.

When a man has made a valid appropriation of his land upon his child (*wulud*),[1] and after him 'upon the poor,' the child who may be in existence at the time of the existence of the produce enters into the benefit of the *wukf*, whether he were born at the time of the appropriation or after it. Such was the saying of Hullal, and it was adopted by the learned of Bulkh, and is approved. And in like manner if the words were, 'On my child, and what child may happen to me, and when they fail, upon the poor.' When a man has made use of these words, though he have no child at the time, the appropriation is valid; and the produce, when there is any, is to be divided among the poor. If a child should be born to him after the division, the subsequent produce is to be expended on this child so long as he lives; and when there is no surviving child it is to be expended on the poor.

Under a *wukf* for a child, the child in existence at the time of the produce takes.

If a man should say, 'I have settled it on my children,' (*awlad*),[2] males and females are included. But in every case in which a right is established in favour of 'children,' it is children of known paternity (*nusub*) that are included. Hence, if there be a child who is not of known paternity, but whose paternity is known on the word of the appropriator, such child is not included. For example, when a man has said, 'I have settled this my land on my child,' and his bondmaid is subsequently delivered of a child within six months of there being produce of the land, and he claims the child, though its descent from him is established, it has no share in the produce. But if his wife, or *oom-i-wulud*, should be delivered of a child within six months from the time of the produce, the child would be entitled to a share in the *wukf*. If, however, the delivery should not take place till six months or more, the child would have no right to participate.

By child is to be understood one of known paternity.

[1] The corresponding term in use in India is the Persian word *furzund*.

[2] Plural of *wulud*, the corresponding term in use in India being *furzundan*, the plural of *furzund*.

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A right attaches to the produce as soon as it has value.

For determining the day when a right attaches to the produce, Hullal has said that it is the day when the produce has value; and he has not made it a condition that there shall be anything over and above the actual expenses. But it has been said that it is the day when the value is something over the expenses, with the *khuraj*, or land-tax, and the compulsory *nuwaib*, or cesses, which are as a debt for which the crop is liable; and this has been approved by the moderns among the learned of Bokhara.

When a right is annexed to a quality, it has reference to the time of the *wukf*, or to the time of the produce, according as the quality is fixed or transient.

If one should say, 'My land is a *sudukah* settled on my one-eyed and blind children,' the *wukf* is theirs to the exclusion of all others; and one-eyedness or blindness is to be regarded as of the day of the settlement, not of the existence of the produce. So also if he should say, 'on the little ones among my children,' the *wukf* is for them specially, and the right is to be reckoned as appertaining to such of them as are little at the time of the settlement, not of the existence of the produce. But if the appropriation were 'for my children who are dwelling in Bussorah,' the residence is to be regarded as having reference to the time of the existence of the produce. The result is that when the right is established on a quality that does not cease, or if it ceases does not return after it has once ceased, it is to be regarded as having reference to the existence of the quality at the time of the settlement; but when the right is established on a quality that ceases and returns again after it has ceased, the right is regarded as having reference to the existence of the quality at the time of the coming of the produce. When a man has settled his land on his male child, males only are included, and not females, because he has described the child by a quality that does not cease. And if he should say, 'My land is settled on the males of my children, and the child of the males of my children,' those only are included who are in existence having this quality on the day of making the settlement. But if he should say, 'I have settled it on those of my children who will profess[1] the *Mooslim* faith,'

[1] The words are in the aorist tense which is used for both the present and future.

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or, 'on those of my children who will marry,' all those are included who have professed the *Mooslim* faith, or have been married since that day, and not those who were then *Mooslims* or married. And if he were to say, 'Among the poor of my children,' without further addition, those who are poor at the time of the occurrence of the produce are included. If he should say, 'among those who have become poor among my children,' though according to Moohummud, the produce would be for those only who from being rich have become poor; yet, according to others, it would be for all those who are poor at the time of the produce, whether they were previously in better circumstances or not; and this is correct. And if the words were, 'all who are in need of my children,' every one answering that description at the time of the produce would be included.

A man has said, 'This my land is a *sudukah* settled on my child' (*wulud*); the produce is for the child of his loins, males and females taking equally, and so long as there is in existence one child of his loins, the produce is to him or her only. When there no longer remains one of the first generation (*butn*), the produce is to be expended on the poor, nothing being allowed to the child of a child. But if he had no child of his loins at the time of the settlement, and there was then a child of a son, the produce is to the son's child, none of the generations below him participating with him; the child of a son in the event of there being no child of the loins, thus coming into his place. The child of a daughter is not included, according to the Zahir Rewayut, which is correct.[1] If, after this, he should have a child of his loins, the future produce is to be expended on such child. When there is no child of the first or second generations, but there happens to be a third, a fourth and a lower generation, the third generation, and those below them, participate together, even though there should be many of them. Everything that has been said

Child means child of the loins where there is any in existence, and if none, child of a son.

Failing whom, it includes all of the lower generations in existence.

[1] The same was held as to *furzund*, the Persian synonym of *wulud*. *Reports S. D. A. Calcutta*, vol. i., p. 107.

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of the words 'my child' is applicable to the words 'child of such an one.'

'Child and child of a child,' includes two generations.

If one should say, 'This my land is a *sudukah* settled on my child, and child of my child,' the child of his loins, and the child of his child in existence on the day of the settlement, and those who are born afterwards are included, and the two generations participate in the produce, but none below them are included, nor the children of daughters, according to the Zahir Rewayut; and the *futwa* is in accordance with it. And if he should say, 'upon my child, and child of my child, and child of the child of my child,' mentioning three generations, the produce is to be expended upon his children for ever, so long as there are any descendants,[1] and is not to be applied to the poor; while one remains the *wukf* is to them, and the lowest among them: the nearer and more remote being alike unless the appropriator say in making the *wukf*, 'the nearer is nearer,' or say, 'on my child, then after them on the child of my child,' or say, 'generation after generation' (*butnun baâd butn*), when a beginning must be made with them with whom the appropriator has begun.[2]

'Child and child of a child, and his child,' includes the future generations.

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[1] *Tunasuoo*, verb of which *nusl* is the root. Its meaning is explained more fully a little further on.

[2] It appears from these cases, that, when two or three generations are mentioned separately and then joined by the word *and*, all the generations participate together; unless there is something to indicate that one generation is to take in succession to another, when the first would have an estate for life in possession, and the others estates in tail, as it is termed in England. There seems to be no reason for a different construction if the settlement were on a person and his children. But *with* denotes conjunction as well as *and*. A settlement on a person *with* children, or *ba furzundan*, as it would be in Persian, ought, therefore, it would seem, to be similarly construed, that is, to him and them jointly. But these words occurring in deeds of grant or gift, when accompanied by words signifying 'generation after generation,' have been usually construed as if they conferred no estate on the children, and merely converted an estate for life into one of inheritance. This is agreeable to the English law, according to which when an estate is given to a man, and then to his heirs, the two estates combine, and form one estate in fee simple, as it is termed. I am not aware of any authority in Moohummudan law for a similar

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If he should say, 'This my land is a *sudukah* settled on my children' (*awlad*), all generations are included on account of the general character of the name; but the whole is to the first generation while any remains; and when they are exhausted, to the second; and when they are exhausted, to the third and fourth and fifth, all these generations participating in the division, and the nearer and more remote being alike. If he should say, 'I have settled it on my children,' and he has only one child at the time of the produce, half of it will be for that child and half to the poor. But if the words were 'on a child,' and he has only one, the whole of the appropriation is for that child. So also when he has had several children and they have failed, leaving only one remaining. A man appropriates an estate by the words, '*sudukah* on his two children, and when they fail then upon the children of both, and the children of the children of both for ever so long as there are descendants,' and one of the children dies leaving a child, half of the produce is to be expended on the surviving child, and half to the poor; but when the second of the children of the appropriator dies the whole of the produce is then to be expended on the children of the two, and the children of the children of the two. If he should say, 'This estate is *sudukah* settled on the needy of my children,'[1] and there is only one needy child among them, the half of the produce is to be expended on him and half on the poor.

Meaning of children.

If a person should say, 'This my land is a *sudukah* settled on my sons,' and he has two or more sons, the produce is to them. If he have but one at the time of the

Settlement on sons.

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construction; and, indeed, the insertion of the words in question in a deed of gift seems to be altogether superfluous; for a gift being absolute in its own nature does not require them. But the construction having been adopted, the formula *ba furzundan*, &c., seems to have come into common use even among Hindoos, for enlarging estates that would otherwise be only life tenures into estates of inheritance or absolute ownership. See *Reports S. D. A. Calcutta*, for 1853, p. 648.

[1] *Wuludee*, literally 'of my child.'

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existence of the produce, half of it is to him and the other half to the poor; and if he have sons and daughters the produce is to them equally, according to Hullal, and this is correct, and is as if he had said, 'My land is settled on my brothers,' having brothers and sisters, when they would all participate. And if he should say, 'upon my sons,' and he has no sons, but only daughters, the produce would be to the poor;[1] and in like manner if he should say, 'upon my daughters,' and he has only sons, the produce would be to the poor.

On a son and his children.

If one should settle his estate 'on his son, and his children, and the children of his children for ever, so long as there are descendants,' the produce is to be divided among them, according to the number of heads, males and females being on an equal footing, and the children of daughters being included.

Meaning of *nusl*.

If one should make a settlement on his *nusl*, or *zureeut* (both words meaning progeny), the children of his sons and the children of his daughters would be included, whether near or remote.[2] But if the settlement were on one who is related to him (*mun yunsiboo*),[3] the children of daughters would not be included.

Illustrations of *nusl*.

A man has said, 'My land is *sudukah* settled on my child and my *nusl*,' the settlement is valid, and the males and females of his children and children's children are included; the near and the remote, the children of sons and the children of daughters, the free and slave, being all equal, though the shares of the slaves belong to their master. And if he should say, 'I have settled it on my child and my *nusl*,' and he has a grandchild at the time, but a child of his loins is born to him after the

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[1] Because though the Arabic word (*buneen*) comprehends sons and daughters, it does not comprehend the latter when there are no sons. *Fut. Ka. Kha.*, vol. iv., p. 260.

[2] The sons and daughters themselves are also included, as will be seen a little farther on.

[3] This is a verb of which *nusub* is the root, and it will be recollected that the strict meaning of that term is 'relations on the father's side.'

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settlement, they both enter into the right. So also if he should say, 'This my land is *sudukah* settled on my children in being,[1] and on my *nusl*,' a child subsequently born would enter by means of the word *nusl*.[2] If the words were 'on my children in being and their *nusl*,' the children in being and their *nusl* would enter, whether the *nusl* were in being or not, but none of his children who are not in being, nor their *nusl*, would be included. So also if he had said, 'upon my children in being, and their children,' and there should afterwards be born to him a child of his loins, that child would not be included. And if he should say, 'upon my children in being, and on the children of their children, and their *nusl*,' his children in being and their children, and the children of their children for ever[3] while there are any *nusl* or descendants, are included; but if he should say, 'upon my children in being, and the children of their children,' and were silent, the child of a child would have nothing.[4]

Under a settlement on children and their *nusl*, all descendants share equally.

When one in good health says, 'I have made this my land a *sudukah* appropriated to Almighty God for ever, for my child, and child of my child, and children of their children, and their *nusl* for ever, so long as there are *nusl*,' every child that he had at the time of the appropriation, and every child born to him thereafter before the existence of the produce, and child of the child for ever, enters into the benefit of the produce of this *sudukah*; and if any of them should die before the existence of produce, the share of the person so dying would fall to the ground; but if the death should not occur till after the existence of the produce, the person dying would have acquired a right to his share, which would pass to his heirs—the higher and lower generations sharing equally, unless it had been said in the making the appropriation that a

[1] *Mukhlook*, literally, 'created.' It includes a child in the womb.

[2] That is, it includes the immediate offspring as well as their descendants.

[3] *Ubudun*. The word *nusl* brings in the second generation.

[4] There the word *nusl* being omitted, the second generation is entirely excluded.

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Unless there are words to indicate that generations are to take successively.

beginning was to be made with the higher generation, and then the generation below it. In that case, if all of the higher generation but one person should die, the whole would go to that person alone, to the exclusion of the generation below. And if one should say, 'for my child and child of my child for ever, so long as there is any *nusl*,' without saying *butnun bâad butn*, but adding, 'as often as one dies his share of the produce is to his child,' the produce would before the death of any of them be among the whole of the children and children's children and their *nusl* equally; and if one of them should die leaving a child, the share of the person so dying would go to his child, who would thus have his father's share in addition to that appointed for himself by the appropriator.

A settlement on children is for the benefit of survivors.

A man has settled his land on his children (*awlad*) with an ulterior destination for the poor, and some of the children die: their shares, according to Hullal, are to be expended on the survivors, and when they all die the produce is to be expended on the poor, and not on any child of a child. But if he had settled it on his children, naming them, saying, 'upon such an one, and such an one, and such an one,' with an ulterior destination for the poor, and one of them should happen to die, his share would go to the poor.

Under a settlement on heirs, they all take equally, with benefit of survivorship.

If one should make a settlement on the heirs of Zeyd, and Zeyd is living, there is nothing for his heirs, and the whole produce passes to the poor. But if Zeyd should die, the whole of the produce must then be divided among his existing heirs, according to the number of them, males and females sharing alike; and if some of them should die, their shares would belong to those alive at the time of the coming of the produce; while, if only one survived, half of the produce would be to him, and the other half to the poor. If, instead of the heirs, he should say, 'The children of Zeyd, being such an one and such an one,' naming them up to five, none but the five would be entitled, and if a child were born subsequently he would have no share.

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Effect of referring the settlement to the death of the maker.

And if a man should say, 'This my land is a *sudukah* settled after my death on my child, and child of my child, and their *nusl*,' and should then die, the appropriation as to the child of his loins is not lawful,[1] but as to his child's child it is lawful. So long, however, as there is a child of the loins living, the produce is to be divided every year according to the number of heads, and what comes to the child of a child is *wukf*, and what comes to a child of the loins is heritage to be divided among all the heirs, so that a husband and wife and others participate.[2] If in these circumstances some of the children of the loins should die, the produce is to be divided according to the number of heads of the children's children and surviving children of the loins, and what pertains to the surviving children of the loins is to be divided among all the heirs living and dead of those who were alive at the death of the appropriator.[3] Hullal has said in his Book of Wukf with regard to a man who made a *wukf* on some of his children, and mentioned that the *wukf* was during his life and after his death,—that the words, 'after his death' do not, according to the most authentic report, constitute a legacy to an heir, but rather bear the construction of a perpetuity.

[1] A bequest to an heir is not lawful, and the reference to death makes the appropriation partake so far of the nature of a bequest.

[2] That is, being undisposed of by the *wukf*, it is to be divided among all the heirs of the deceased, whoever they may be, according to the rules of inheritance.

[3] That is, I suppose, among the surviving heirs of the deceased, and the representatives of those who may have died intermediately.

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Section Third.

Settlements on Kurabut[1] *or Kindred.*

Meaning of the word *kurabut.*

Aboo Yoosuf and Moohummud have said that by *kurabut* is to be understood everyone related to a person through a common ancestor up to the farthest back in *Islam*, either on the father's or the mother's side, and whether within the prohibited degrees or not, and that the near and the remote are alike in this respect, whether the word be in the singular or the plural. But according to Aboo Huneefa, when the settlement is made in the singular, as, for instance, 'on my *kurabut*—on a person[2] of my *kurabut*,' it is the nearest of the relatives within the prohibited degrees that enters into the benefit of the *wukf*; while if the settlement be in the plural, as, for instance, 'on persons[3] of my *kurabut*—on my *ukriba*'[4] (or relatives), the whole of those above mentioned are included; so that the words are applicable to two or more. With regard to the meaning of Aboo Yoosuf and Moohummud in the words 'most remote ancestor in *Islam*,' some say that it is the most remote who adopted the Mussulman religion, but others, the most remote ancestor since the promulgation of *Islam*, whether he adopted the faith or not. In a *wukf* on 'the *kureeb*,'[5] the produce is divided according to heads, the young and the old, the male and the female, the poor and the rich being all alike, because the noun is equally applicable to all. But neither the father of the appropriator nor the children of his loins are included, nor his grandfather according to the Zahir Rewayut. A man has made a

[1] So spelled, with a *futha* in the first syllable, it means literally 'relationship.' But as the word is used in the sense of 'related,' it may possibly be also spelled with a *zumma* (*koorabut*), a rare form in which the passive participle is sometimes found.

[2] *Zee*, inflected case of *zoo*, master or possessed of.

[3] *Zuvee*, plural of *zoo*.

[4] Pl. of *kureeb*—derivative adjective from the same root as *kurabut*.

[5] *Sing. et Plur.* (Freytag).

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settlement on the needy of his *kurabut*, and then died, may the superintendent give of the produce to a son of the appropriator's son when poor? According to Aboo Huneefa and Aboo Yoosuf he cannot; for the child of a child, according to them, is not of the *kurabut*.

What we have said[1] as to a person's *ukriba* and *zuvee'l kurabut* is equally applicable to his *urham*[2] and *zuvee'l urham*, and *unsab*[3] and *zuvee'l unsab*.

Meaning of the words *urham* and *unsab*.

When a person has made a settlement on the nearest of men to him, and after that to the indigent, and has a son or a father, he enters into the benefit of the *wukf*; though, if his words were, 'on the nearest of men among my *kurabut*,' they would not enter into it. And if he has a son or a daughter and both parents, the son or daughter alone is entitled, and on their death the produce belongs to the indigent and not to the parents; while, if he have his parents only, the produce is to them in halves, and if either should die his or her half would pass to the poor. In like manner, if he have ten sons and one of them should die, his share goes to the indigent. And if he has a mother and brothers, or a mother and grandfather, the produce is to her alone to the exclusion of the others, she being the nearer. The same is true of the father also. And a father is nearer than a son's son; but a son's son is preferred to a full brother, and a daughter's daughter to a son's descendant in a lower grade. So also a daughter's daughter's daughter is preferred to a full sister.

A son and father included in the word 'nearest.'

Section Fourth.

Settlements on the Poor[4] of one's Kindred.

When a man has said, 'This is a *sudukah* settled on the poor of my kindred, or the poor of my children, and after them on the indigent,'[5] the settlement is valid, and

Of what time the poverty is to be reckoned.

[1] That is, as to the use of the singular and plural.

[2] Pl. of *ruhm*, the womb. Technically, all of the *kurabut* who are not sharers or residuaries.

[3] Pl. of *nusub*. See *ante*, p. 582.

[4] Pl. of *fakeer*.

[5] Pl. of *miskeen*.

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the persons entitled are those of them who are poor at the time of the coming of the produce, according to Hullal, whose opinion 'we' approve, and the *futwa* is in accordance with it. The answer would be the same if, instead of 'the poor,' he had said 'the indigent and the needy of my kindred.' If one, after making a settlement on the needy of his kindred, and then on the poor, should die leaving a poor son, Aboo Yoosuf has said that he does not come within the meaning of kindred; and this is correct. When there are poor of an appropriator's kindred in another city than that in which he resides, the produce is not to be sent to them, but is to be divided wholly among those of his own city; though if the superintendent should send any of it away to them he would not be responsible.

Effect of 'beginning with the nearest.

If one should say, 'on the poor of my kindred, beginning with the nearest,' the produce, when obtained, is to be given to the extent of 200 *dirhems*, but no more, to the nearest of kin to the *wakif*, and then 200 to the next, and so on till the last of them. When each has received 200 *dirhems*, the surplus, if any, is to be divided, on a liberal construction, equally among all of them.

Who are held to be poor.

In this matter all are held to be poor who are so accounted in the matter of *zukat*, or poor's-rate. In both cases a person who has only a dwelling-house, or that and a servant, is held to be poor. So also when with this he has a sufficiency of clothes without anything superfluous, or house furniture that cannot be dispensed with. But if he have an excess of 200 *dirhems* above his clothes and furniture he is to be accounted rich, and can take neither of the *zukat* nor of a *wukf*. So also, if he have two dwelling-houses or two servants, and the superfluous house or servant is of the value of 200 *dirhems*, he is to be accounted rich, so as to render it unlawful for him to participate in *zukat* or *wukf*, but not so as to render him liable to the former. And though the surplus above his dwelling-house, or the surplus above his clothes or his furniture, should not each by itself be of the value of 200 *dirhems*, yet if all taken together are of that value, he is rich and cannot lawfully participate, either in *zukat* or in

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wukf. And if he have land of the value of 200 *dirhems*, though the income from it be insufficient for his maintenance, still he is rich according to what is approved. Though he should have plenty of property not immediately available, or in debts owing to him by other persons, he may be allowed to take of the *zukat* or the *wukf*, for he is in the condition of a traveller: yet if he can borrow, it is better for him to do so than to receive from a charity.

No person entitled to maintenance from another is poor.

Everyone who is entitled to maintenance from another, and who may take it without his consent or the order of a judge,[1] or to whom the judge may award it out of the property of an absent person,—and every person the profits of whose property are so mixed up with those of another that neither can be accepted as a witness for the other, is accounted rich in respect of *wukf*, on the strength of the wealth of his maintainer, or person with whom he is so connected; and of this parents and children and grandparents are examples. But persons who, though entitled to maintenance from another, yet cannot take it without his consent or the order of a judge, and to whom the judge cannot assign maintenance against another during his absence; and persons the profits of whose property are so distinguishable from those of another that each may be accepted as a witness for the other,—are not to be accounted rich on the strength of the wealth of their maintainers; and of this brothers and sisters and other relations within the prohibited degrees are examples. When a poor woman has a rich husband she is not to receive from the *wukf*; but when a poor man has a rich wife he may receive from it.

Section Fifth.

Settlements on Neighbours.[2]

Who are neighbours.

When a man has made a settlement on his neighbours, the produce ought to be expended, according to analogy, on all who are adjacent to him; but on a free construction,

[1] See *ante*, p. 463.

[2] *Jeeran*, pl. of *Jar*.

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it is for those who assemble together with him, and come to the *musjid*, or place of worship, of the *muhullah*, or sub-district; and this is approved. Residence is the condition, according to the plain doctrine of Aboo Huneefa, whether the resident be proprietor or not; and this also is correct. When the inhabitant is not the proprietor, the benefit of the *wukf* is to the resident, and not the proprietor. The neighbour, whether *Mooslim* or infidel, male or female, free or *mookatub*, minor or adult, is entitled; and the produce is to be divided among them according to the number of heads, the superintendent being responsible if he give more to some than to others. An *oom-i-wulud*, *moodubbur*, or absolute slave, has no right to participate; nor a debtor who is imprisoned within the *muhullah* for debt; nor the son, father, grandfather, or wife of the appropriator; nor the child of a child, though he be a neighbour, on a liberal construction. But his brothers and paternal and maternal uncles do participate.

After a change of residence.

If among the appropriator's neighbours there are some who have gone to another *muhullah*, selling their mansions to other persons who have come into them after the ripening of the crops, but before they are gathered, these are to be regarded as neighbours who are such at the time of the division of the produce. And if a person should make a settlement on his neighbours, having a mansion in which he is residing, but should remove to another and reside in it on hire, and die there, the produce is for his neighbours in the mansion to which he has removed, and where he has died. And if a man, after making a settlement on his neighbours, should remove to Mecca and die there, the produce would belong to his neighbours in Mecca, if he had taken a house there; but if he had gone on pilgrimage, it would belong to his neighbours in his own city. If a man have two mansions, in one of which he resides, and in the other of which he keeps his produce, the produce is for his neighbours in the house in which he lives. If he have two mansions, and a wife in each, the neighbours of both are entitled to the produce, though he should die in one of them. So, also, though one of the houses be in

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Bussorah and the other in Koofa, he having a wife in each. And if a person should make a *wukf* for the poor of neighbours, without referring to himself, as, for instance, by omitting to say 'my neighbours,' it would be the same as if he had said 'my neighbours.' If a man should fall sick and be removed by his son to another *muhullah* or village, and die there, his first neighbours would be entitled, this being no proper removal. But if a woman inhabiting a mansion should make a settlement on her neighbours, and afterwards marry, and be taken to the house of her husband, and die there, her neighbours are those of her husband. So, also, when a man has married a woman and removes to her house, his neighbours are changed to hers, unless he has left his furniture in his own house, when they say his neighbours are those who were so before his removal.

The neighbours must be ascertained before a division of the produce.

When it is not known who are a man's neighbours, the produce is not to be divided until witnesses testify to the house in which he died; and then a distribution is to be made among the neighbours of that house. And if a neighbour should claim as being poor, and the fact of his poverty is not known, he must be put to the trouble of producing witnesses to prove it.

Section Sixth.

Settlements on the People of one's Beit or House, and on Al or Jins and Akub.

Who are comprehended in a person's *Beit.*

When a person has made a settlement on the people of his *beit* or house, every one is entitled who is connected with him through his fathers to the most remote of them in Islam; and the *Mooslim* and the infidel, the male and the female, the prohibited and the unprohibited, the near and the remote, are in this all alike. The remotest ancestor, however, is not included. But the child and parent of the appropriator are included, though the children of his daughters and sisters are not; nor the children of any other females besides these, except when married

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to paternal nephews of the appropriator. Surukshee has stated in his commentary on the Siyyur Kubeer that the words 'people of the house,' when they occur in deeds of *wukf* or wills, are to be taken as intended by the person using them. If by 'house' he intended his residence, 'the people of his house' should be taken as meaning those who reside in family with him, and are maintained by him though there may not be any of his *kurabut* or kindred among them; and if by 'house' he meant *nusub*, then the people of his house are all the known children of his father. But the Imam Aly As-Soghdee maintained that if the person have a house of *nusub* like the Arabs, the words 'people of his house' are all the children of his fathers, though they should not be residing in family with him; and that if he have no house of *nusub*, they are those living in family with him and maintained by him, and none others, though they should be of his kindred; and this is approved. When a man has made a settlement on the people of his house, those in existence are included, and those who may come after them of their children and children's children.

Al and *jins* have the same meaning.

A man's saying, 'on my *ál*,' or 'on my *jins*' (kind), is like his saying, 'on people of my house;' and there is no speciality in favour of the poor, unless the *wukf* is made specially for them. His saying, 'on the poor of them,' and 'on those who become poor,' is the same thing. So that the produce is for him who is poor at the time, though he were rich when the settlement was made; and it is not restricted to those who were rich and have become poor. If a woman should make a settlement 'on the *ahl* (people) of her house,' or, 'on her *jins*,' her mother and her child would not be included.

Meaning of *ahl*.

If a man should say, 'on the *ahl* of Abdoollah,' it would be for his wife specially, according to Aboo Huneefa. Hullal, however, has said, 'We think it better to make it include all free persons of his family living together with him in his house;' and this is approved. But slaves are not included, nor Abdoollah himself, nor persons of his family living in another house.

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Âyál[1] comprehends everyone maintained by a person, whether living in his house or not; and *hushum* is instead of *âyál*. By *âkb* are to be understood all those who are connected with a person through his father;[2] and the children of daughters are not included, except females, whose husbands are among these. And if one should make a settlement on Zeyd and his *âkb*, Zeyd himself being alive and having children, these would have nothing, for the child of a man cannot be called his *âkb*, except after his death.

Of *âyál*, *hushum*, and *âkb*.

Section Seventh.

Cases where, after an Appropriation for the Poor, the Appropriator himself, or some of his Children, or Kindred, are in Want.

It is declared in certain *futawa*, or decisions, that when a man has made his land a *sudukah* appropriated to the poor and indigent, and has subsequently fallen into want himself, nothing is to be given to him thereout. And if a man should say, being in health at the time, 'My land is a *sudukah*, appropriated to the poor after me,' or if he should say this in sickness, and die, leaving a little daughter, it would not be lawful to expend the produce on her; and so it has been decided.[3] But if some of his kindred, or some of his children, should fall into want, and the *wukf* were made in health, the produce is to be disposed of subject to the following rules:—1. It is to be expended, in the first place, on the poor of his kindred, and the surplus only given to strangers. 2. Poverty on the day of the produce coming into existence, is not to be regarded, but rather poverty on the day of distribution. 3. The nearest in kindred are first to be supplied,

The *wakif* himself, though he should become poor, cannot participate.

But his children may, if they fall into poverty.

[1] Pl. of *áyyil*.

[2] The literal meaning is successor.

[3] The reference to death in the words *after me*, or actual death-sickness would give the appropriation the character of a legacy, and the daughter being an heir, a legacy to her would be unlawful.

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and then the more remote, that is, the child of the loins has priority, and after him the child of a child, then the third generation, and then the fourth, and a lower generation. If none of these remain, or there is a surplus after satisfying them, it is to be bestowed on the more remote of poor kindred, beginning here also with the nearest among them. 4. That to each person to whom a portion is given, something less than two hundred *dirhems* be given, that is, when the *wukf* is for the poor generally, and some of the kindred are in need. But if the *wukf* be for the poor of a person's kindred, the whole produce is to be distributed among them, though the share of each should exceed two hundred *dirhems*.

When an appropriator has appointed the produce for debtors, or travellers, or in the way of God, or for pilgrimage, and some of his children or kindred fall into want, no part of it is to be given to them, unless the child or the relative be a debtor, or a traveller, &c., when, also, a beginning is to be made with them.

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CHAPTER IV.

OF WHAT DEPENDS ON A CONDITION IN THE WUKF.[1]

Wukf with a condition in one's own favour is valid.

WHEN a man has made an appropriation of land or something else, with a condition that the whole or a part of it shall be for himself while he lives, and after him for the poor, the appropriation is valid, according to Aboo Yoosuf; and the sheikhs of Bulkh have adopted his opinion, and the *futwa* is in conformity with it, as an inducement to the making of appropriations. There are several ways in which this may be done; as, for instance, by a person's saying, 'On condition that he[2] will pay my debts out of the produce,' or 'When death happens to me, if I should be in debt, that he will begin with the payment of my debts,' or 'When death happens to such an one' (meaning the appropriator himself), 'take every year one-tenth share of the produce, and apply it to the performance of the *hujj*, or pilgrimage to Mecca, on his account, or in the expiation of his vows, and so and so' (naming something), or 'Take every year out of this *sudukah* such and such *dirhems*, and expend them in such a manner, and the remainder so and so.' And in all these cases the *wukf* would be lawful. And if he should say, 'A *sudukah* appropriated to Almighty God—he will

Ways in which it may be effected.

[1] A *wukf* is *primâ facie* for the poor, and whatever else is intended must be expressed in the *sikk*, or writing of appropriation. This I conceive to be the meaning of the title of this chapter—not that everything contained in it must be expressed in the form of a condition. It has been already seen that settlements in favour of one's self and children may be made *directly*.

[2] The superintendent.

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pass its produce to me while I live,' without adding anything more, it would be lawful, and after his death be for the benefit of the poor. So, also, if he should say, 'This my land is a *sudukah* appropriated,—he will pass the produce to me while I live; then, after me, to my child and my child's child and their *nusl* for ever, while there are any, and when they cease, to the indigent,' this also would be lawful. So, also, if he should make it a condition, 'That he may maintain himself and his child, and pay his debts out of the produce, and that when death happens to him, the produce of this estate is for such an one, the son of such an one, and his child and child's child, and his *nusl*.' Or if he should begin by saying, 'for such an one, and then for himself, it would be lawful as conditioned, the putting himself first or last making no difference. A person makes an appropriation for the poor, with a condition 'that he may eat and feed others' (out of its produce) 'so long as he lives, and that after his death it is to be for his child, and in like manner to his child's child for ever, while there are any descendants:' the *wukf* is lawful with such a condition. So, also, if he should stipulate 'that a part of the produce is to be for his *oom-i-wuluds* or *moodubburs*,' it would be lawful, without any difference of opinion. And so, likewise, if it were for his absolute slave, according to Aboo Yoosuf, though on this point Moohummud was of a contrary opinion. A man settles a field (*zuyut*) on his wife and children; she then dies, but her share does not go to her own son specially. It reverts to the whole of the children. Where, again, the field is settled half on his wife and half on one child in particular, on condition that if his wife should die her share is to go to the children, and ultimately to the poor, the child specially mentioned would be entitled to a share of her share in the event of her death. A field is settled on a man on condition that a sufficiency is to be given him every month. He has no family at the time, but afterwards has a family. A sufficiency is to be given to them also.

When there is a condition in the *wukf* 'that he may

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exchange the land for other land as he pleases, and that the land so obtained shall become *wukf* instead of the first,' the appropriation and the condition are lawful, according to Aboo Yoosuf; and so also when there is a condition 'that he may sell and make an exchange for the price.' And it has been said that Hullal was of the same opinion, and the *futwa* is in conformity with it. But after the exchange has once been made, it cannot be made a second time, unless there are words indicative of an intention that he may exchange continually. When the words are, 'that I may exchange for other land,' he cannot exchange for a mansion: nor *vice versâ*. But he may purchase *khuraj* land with the price. When the power to exchange is reserved to himself, he may appoint an agent for the purpose, but if he should bequeath the power to an executor, his executor cannot exercise it. And if the power is reserved to another and himself, the other cannot exercise it singly, but the appropriator himself may lawfully do so. When the power to exchange is given to 'everyone that may preside over this *wukf*,' it is lawful, and every president may exercise the power. But when the appropriator has said, 'on condition that such an one shall have the power of exchanging,' and has then died, the person so authorized cannot exercise the power after his death without an express condition to that effect. The *kuyim*,[1] or administrator, has no power to exchange unless expressly authorized to do so. And when it is made a condition that he may exchange, the appropriator himself may also exercise the privilege without a similar condition in his favour.

Conditions for the exchange and sale.

Without an express condition in the *wukf*, the land cannot be sold or exchanged, though it should be saltish and useless. In one place Kazee Khan has said that the judge may order its sale, though there should be no condition to that effect, when he thinks it expedient; but in

The *wukf* cannot be exchanged or sold without such a condition.

[1] Derivative adjective from *kamu*, he stood. Rei præfectus (Freytag). The officer who is elsewhere termed the *mootuwulee* or superintendent.

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another he denies that the judge has any such power The most trustworthy opinion, however, is that the judge may lawfully sell the land if it be quite useless, and there is no increase from it, provided that the sale is not at an inadequate price.

A *wukf* is lawful with a condition to apply the produce at the pleasure of the appropriator;

When a man has said, 'My land is a *sudukah* appropriated to Almighty God for ever, on condition that I may employ the produce as I please,' he may lawfully do so. But if he should apply it to the indigent, or in pilgrimage, or to a particular individual, he cannot reclaim it. And in like manner, if he should say, 'I have given it to such an one,' he has no power to reclaim it. He may give it to one set after another. Yet if he were to apply it to himself, the *wukf* would be void. It would be different if he had said, 'on condition that I may give it to whomsoever I please.' When a man has settled his land on condition that he may give the produce to whom he pleases, the *wukf* is lawful, and he has the power of doing so while he lives; but it ceases on his death; and he cannot eat of the produce himself. He may, however, bestow it on the rich, or even on one rich person in particular. A man makes a *wukf* of his estate on condition that the administrator may give the produce as he pleases; this is lawful, and he may give it to rich and poor. If he should say, 'on condition that such an one may give the produce to whomsoever he pleases,' it is lawful, and the power may be exercised during the life of the appropriator, and after his death; and the person authorized may give to his own child and *nusl*, and also to the child and *nusl* of the appropriator, but not to himself. The power, however, does not pass out of his hands on his saying, 'I have given the produce to myself;' but if he were to say, 'I have given it to the appropriator, the *wukf* would be void,' according to those who say that a man cannot make a *wukf* in his own favour. It is different when the appropriator has reserved the discretion to himself; for in that case, if he should give it to himself, the *wukf* would not be void. If the authorized person should give the produce to the rich, the *wukf* would also be void.

or of the administrator;

or of a third party.

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If one should say, 'My land is a *sudukah*, appropriated for the sons of such a one, on condition that I may select of them whom I please,' it would be as he has said, and he may select as he pleases, or give the whole to one; and if he should say, 'I make no selection this year,' it would be lawful, and the produce be among them all equally. And if he should say, 'on condition that I may deprive whom I please among them,' and he should deprive them all but one, it would be lawful; and though by analogy he should not be able to deprive them all, he has that power also on a favourable construction. But he cannot restore those whom he has deprived, and the *wukf* would be for the poor. If he say, 'I have deprived them of the produce of this year,' they have no right in that year's produce, and it passes to the poor.

So also a condition that the appropriator may select among certain parties, or may exclude any of them.

A man makes a *wukf* on his *oom-i-wulads*, except that if one of them marries she is to have nothing, and one of them does marry, but is subsequently divorced; in these circumstances she has nothing, unless it were provided that in the event of being divorced she should be restored to the benefit of the *wukf*. In like manner, when a *wukf* is for the sons of such an one, except those who go out of the city, and some of them go out, but return again; or when it is for the benefit of the sons of such an one, who are acquiring knowledge, and some of them abandon the study, but afterwards resume it,—the parties continue to be deprived of the benefit of the *wukf*, in the absence of any condition to the contrary. And if one should make his land a *sudukah*, settled on his child and *nusl* for ever, and after them on the poor, with a condition that all of them who may leave the sect or doctrine of Aboo Huneefa for that of Shafei shall lose the benefits of the *wukf*, and one of them does so, he is excluded. And if the condition were that if one of them shall leave the doctrine of the Soonnees and become a heretic he shall be expelled, and one of them apostatizes, he is to be expelled. A man and woman are on the same footing; and when it is made a condition that if one should depart from the established doctrine he is to be expelled, and one of them does so, and

Exclusion may be made to depend on a condition.

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then returns, he is not to be restored to the benefits of the *wukf*, without an express condition to that effect. In like manner, when a particular doctrine has been specified, and there is a condition that if any depart from it he is to be deprived, regard must be had to the condition. So also when the condition is, 'that if any of my kindred go from Baghdad he is to have nought,' respect must be had to the condition; except that here, if he return to Baghdad, he would be restored to the benefits of the *wukf*.

Some other conditions that must be observed.

Among conditions that must be respected, Khusaf has mentioned a condition that the superintendent shall not let the lands, and if he does let them, the lease shall be void; a condition that he shall not enter into a *mooamulah* [1] for the palm, or other trees; and a condition that when the superintendent has let the land, he shall be expelled from the office. In such a case, if he should act contrary to the condition he is to be expelled; and the judge to appoint another, whom he can trust, to carry out the condition.

[1] A compact of gardening, by which the proprietor of the trees and the gardener divide the produce in certain proportions.

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CHAPTER V.

OF THE GOVERNANCE[1] OF THE WUKF.

Who may be appointed.

THE proper person for the superintendence of a *wukf* is one who does not seek for the office, and in whom there is no known or apparent wickedness. No one should be appointed but an *ameen*, or trustee, who is able to act by himself or by deputy; and in this males and females are alike,[2] and so also the blind, and those who are possessed of sight, and even one who has undergone the *hudd*, or specific punishment for slander, may be appointed if he have repented. But puberty and understanding are essential in all cases to a valid appointment. Moohummud, the son of Alfuzl, being asked respecting one who had made it a condition in constituting a *wukf* that the governance of it should be for himself and children, answered, 'It is lawful, according to all.' A man makes a *wukf* without mentioning any one for its governance,—it has been said that the governance is for the appropriator himself; and this is agreeable to the opinion of Aboo Yoosuf, for with him delivery was not a necessary condition, but according to Moohummud, the *wukf* is not valid; and so it is decided.

The maker may lawfully appoint himself and children;

but cannot resume the *wukf* after appointing another, without

A man having appropriated his estate, and delivered up possession of it to the administrator, desires to take it out of his hands. If he made it a condition in the *wukf* that he should have the power to discharge the administrator, and withdraw the *wukf* from his hands, he may

[1] *Wilayut*; also spelt with a *futha* (*u*) in the first syllable.

[2] As to the competence of females, see also *Reports S. D. A. Calcutta*, vol. i., p. 217.

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an express condition to that effect;

lawfully do so; otherwise he cannot, according to Moohummud; but according to Aboo Yoosuf, he can; the sheikhs of Bulkh deciding with the latter, and those of Bookhara with the former, with whom also is the *futwa*.

and may himself be removed by the judge for malversation.

Though the appropriator should make it a condition that the governance is to be for himself, the judge[1] may, nevertheless, take it out of his hands, if he is not trustworthy. And should he neglect to make repairs, having of the produce in his hands, the judge may compel him to do so, and if he fail to make them, take the *wukf* out of his hands. Even though he should have made it a condition that neither the Sultan nor the judge shall have the power to remove him, yet if he cannot be trusted with the *wukf*, the condition is void, and the judge may remove him and appoint another. The judge may also remove one appointed by the appropriator, when it is for the advantage of the *wukf*.

Different kinds of appointment.

If the appropriator should make it a condition 'that such an one shall appoint, and I shall not have the power to discharge,' the appointment would be lawful, but the prohibition to remove would be void. And if he should give the governance during his life and after his death, it would be lawful, and the person appointed be his agent during his life, and his executor after his death. The effect would be the same if he should say, 'I have appointed thee my agent in this *sudukah* during my life and after my death.' But if he should say, 'I have invested thee with the governance of this *wukf*,' he would have it only during his life and not after his death. If he should make no appointment of a *kuyim*, or administrator, till the approach of death, and then appoint an executor, the person appointed would be the executor with regard to his property, and administrator of his *wukfs*. But if after that he should appoint another executor, the second person would only be executor for the property, and not

[1] *Kazee*. The term is not applied to any other than the judge, though the author of the *P. P. M. L.* has inadvertently rendered it, in citing this passage, the *ruling power*. (*Prin.* 5 p. 69).

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administrator of the *wukfs*. If, however, he should say, 'I have revoked every appointment of executor made by me,' the governance of the *wukf* would be to the new executor, and the former *mootuwulee*, or superintendent, would be discharged.[1] When one appoints a person the executor of his *wukf*, and makes it a condition that he shall not bequeath the power to another, the condition is lawful.

If an executor be appointed for a *wukf* specially, he is executor in all matters according to Aboo Huneefa and Aboo Yoosuf; and this is authentic. And in like manner if a person should appoint one executor for a *wukf* and another executor for his child, or if he should appoint one person executor for a particular *wukf* and another person executor for another *wukf*, the persons appointed would be executors of both together.

The appointment may be limited.

If one should make an appointment of Abdoollah till Zeyd comes, it is as he has appointed; and when Zeyd comes they are both *wulees*,[2] or governors, according to Aboo Huneefa. But if he should say, 'When such an one comes the administration is to him,' the present administrator would have no authority after the arrival of the absent one, to whom the power would be immediately transferred, according to Aboo Yoosuf and Hullal. And if he should say, 'The administration is to Abdoollah while he remains in Bussorah,' it would be as conditioned. So also if he should say, 'to my wife till she marries,' then whenever she marries she ceases to have any authority. And if he should say, 'The authority is to Abdoollah, and after him to Zeyd,' and Abdoollah should die, having appointed an executor, Seyd would, nevertheless, be the administrator.

On the death of

When the superintendent has died, and the appro-

[1] A different author is cited, which may account for a different name being given to the officer, though the same is evidently intended by *kuyim* and *mootuwulee*.

[2] Active participle of *wula*, from which *mootuwulee* is also derived. The same officer is evidently intended.

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the superintendent the appointment of his successor belongs to the appropriator or his executor; failing whom, the judge.

priator is still alive, the appointment of another belongs to him and not to the judge; and if the appropriator be dead, his executor is preferred to the judge. But if he had died without naming an executor, the appointment of an administrator is with the judge. In the *Asul* it is stated that the judge[1] cannot appoint a stranger to the office of administrator so long as there are any of the house of the appropriator fit for the office; and if he should not find a fit person among them, and should nominate a stranger, but should subsequently find one who is qualified, he ought to transfer the appointment to him. When the appropriator has made it a condition that the superintendent shall be of his children and children's children, and the judge[2] appoints another than one of these without any *khyanut* or malversation, is the person so appointed the superintendent? Boorhan-ood-Deen has said, 'No.' If a judge should die, or be dismissed from office, appointments made by him still remain good.

The superintendent may himself appoint his successor.

A superintendent may at death commit his office to another, in the same way as an executor may commit his to another. But when the appropriator has assigned some particular property for this superintendent, it does not belong to the person to whom the office has been bequeathed; and the matter must be submitted to the judge, in order that he may assign for him the hire, or salary of similar work, unless the appropriator had assigned the allowance for every superintendent. A superintendent while alive and in good health cannot lawfully appoint another to act for him, unless the appointment of himself were in the nature of a general trust.

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[1] The word here used is *hakim*, for which see *ante*, p. 574, note. It was held by the S. D. A. of Calcutta, in a case reported vol. i., p. 135, that the appointment is with the 'ruling power,' which is very probably the judge's translation of the word *hakim* in the *futwa* of the law officer. In a previous case (vol. i., p. 18) the law officer had said that the power of appointing a superintendent belongs both to the *kazee* and *hakim*.

[2] Here the original word is *kazee*, which undoubtedly means judge.

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When the superintendent of a *wukf* has sold or pledged anything belonging to it, this is malversation for which he may be dismissed, or another trustworthy person conjoined with him in the management.[1] If he has sold a mansion purchased with property of the *wukf*, he may agree with the purchaser for a dissolution of the sale, unless the sale had been for more than the price of a similar of the mansion; and when he has been discharged, and another appointed in his stead, the person so appointed may do so likewise, without any difference of opinion.

Superintendent cannot sell or pledge the property of the *wukf*;

When the administrator of a *wukf* desires to erect a village in it, that he may increase its people, and protect it, and plant corn in it, because this is required, it is lawful for him to do so; as in the case of a *khan*, or inn for the poor, when a servant is required to sweep the *khan*, and open and shut the door, and the superintendent delivers one of its houses to a person appointed for this work; and if the land be adjacent to the houses of a city, so that the inhabitants wish to hire the houses belonging to it, and the rent would be more than the produce of cultivated lands and palm-trees, the administrator may erect houses on the land, and let them. But when the appropriated land is distant from the houses of the town, this cannot lawfully be done.

but he may erect a village on it.

When land of a *wukf* is bad and uncultivated, and the administrator desires to sell part of it, in order to improve the rest with the price of what he has sold, this is not within his competence; and if an administrator should sell any part of the buildings that has not fallen down, with a view to their removal, or palm-trees of a garden that they may be cut down, the sale is void; and if the purchaser should pull down the buildings, or cut the trees, it is the duty of the judge to dismiss the superintendent from his office, because this is malversation; and he may make either the seller or the purchaser responsible

Cannot sell land that is bad to improve the rest, nor cut down trees, &c.

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[1] That the alienation is unlawful, see Moore's *Indian Appeals*, vol. ii., p. 390.

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for the value; but if he make the seller responsible, operation is given to the sale, while if the purchaser is made responsible, the sale is void. Trees in a vineyard cannot lawfully be sold when the fruit of the vines is not injured by their shade; and though it should be injured by their shade they cannot be sold, if their fruit is more profitable than that of the vines; but if it be less profitable, the trees may be cut down and sold. Trees which are not fruit-bearing may also be cut down and sold whenever their shade is injurious to the fruit of the vineyard, but not otherwise. But trees that shoot out a second or third time may be cut down and sold, for they are like corn and fruit. So also the sale of the leaves of the mulberry-trees is lawful. But if the purchaser should attempt to cut down the trunks he should be prevented; and if the superintendent refuse to prevent him from cutting them, this is malversation.

A mansion appropriated for the poor is to be let.

When a mansion has been appropriated for the poor, the administrator should let it to hire, the rent being applicable, in the first place, to its repairs; and he should not allow any person to occupy it without paying rent. If an administrator should die after he has given a lease, the lease is not made void. Nor is a lease granted by the appropriator himself dissolved by his death, on a liberal construction, though it ought to be so by analogy.[1] When a judge who has granted a lease is dismissed from his office before the expiration of the term, the lease is not made void. And if the lease has been granted by a superintendent who is himself the party entitled to the benefit of the *wukf*, it is not dissolved by his death, though the produce is his.

The lease should not exceed a year; but a lease of land may be for three years.

When the superintendent of a *wukf* has let a mansion appropriated for the poor for more than a year, the lease is unlawful. In the absence of any condition, the approved doctrine is that the lease of estates in land may be decreed to be lawful for three years, unless it be for the benefit of

[1] As in the case of an ordinary lease, which is cancelled by the death of the lessor.

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the *wukf* to annul them; and that with regard to leases of other property, they should be decreed to be unlawful when they exceed one year, unless it be for the benefit of the *wukf* to sustain them. But this varies with the change of places and times. This is approved for the *futwa*; the same being also applicable to contracts of *moozaraut* and *mooamulut*. If the appropriator had made it a condition that leases shall not be granted for more than a year, and people are unwilling to take them for so short a period, still the administrator has no power to grant a longer lease, but should lay the matter before the judge, that he may lease it for more than a year.

The rent must be that of similar property.

It is not lawful to let a *wukf* except for the rent of similar property. But when a *wukf* has been let for three years at a known rent, equal to that of similar property, so that the lease is lawful, it is not to be cancelled, though rents should fall or rise during the period. When the appropriator himself has granted a long lease, and there is ground to apprehend that the substance of the *wukf* may be injured, the judge (*hakim*) may cancel the lease. Though the superintendent of a *wukf* should allow a person to occupy it without paying rent, he is nevertheless liable for the rent of similar property, according to the generality of 'our' modern sheikhs; and the *futwa* is to the same effect. And when the superintendent has let the property of a *wukf* at an inadequate rent, so that the lease is unlawful, and the tenant has occupied it, he is liable for the rent of similar property, whatever it may amount to, according to what is approved by the moderns. So, also, if he occupy under an invalid lease. If the superintendent of a *wukf* should give a lease of it to his adult son, or to his father, it would not be lawful, according to Aboo Huneefa, except at a rent above that of similar property. But the administrator of a *wukf* may cultivate the lands himself, and hire labourers, and pay them wages out of the income of the *wukf*. He may also hire labourers about its business, and in digging reservoirs of water, and in every other thing beneficial to it, when required.

The judge may cancel improper leases.

When the *khuraj*, or land-tax, and *jubayát*, or tribute,

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Circumstances in which the superintendent is allowed to borrow.

are demanded of a superintendent, and he has no means of paying them out of the *wukf*, he may borrow for the purpose, if that be allowed by the appropriator, and if not, he should lay the matter before the judge, who may direct that debt be incurred on this account, to be afterwards repaid out of the produce. For repairs, debts must be incurred, under the directions of the judge. But as to other purposes, it cannot be incurred, even with his permission, to expend on persons who are entitled to the benefit of the *wukf*. For the price of seed it may certainly be incurred, with his permission; but whether it can be so without his permission, authorities vary.

Superintendent must give the same attention to his duties as is customary.

When the appropriator has given to the person whom he has set over the business of the *wukf* certain known property every year for the administration of its affairs, this is lawful; and the administrator must take the same trouble as is done in similar cases, and as is customary, in regard to repairs and the receiving and distributing of the produce. So that if the governance were given to a woman and a known hire were assigned for her, she is not to be troubled except for the like of what it is customary for women to perform.[1] And if the people of the *wukf* should complain of the administrator, and say to the judge (*hakim*) that 'the appropriator gave this in exchange for work which he does not perform,' the judge (*hakim*) is not to trouble him on account of work which is not usually done by governors. And though a calamity, such as blindness or deafness, should befall the superintendent, still, if he is able for his work, the salary is to be continued to him; but if disabled, he is to have no part of it.

Superintendent

If a complaint is made against a governor, the judge is not to remove him from the governance of the *wukf*, except

[1] But when the management of the *wukf* was combined in the deed of settlement with its *sujjadah-nisheenee*, or right of superintending a religious establishment—a function which a female cannot exercise—it was decided, on the opinion of the law officer, that the former office could not be held by a female.—*Reports S. D. A. Calcutta*, vol. i., p. 107. *Sujjadah* is the carpet used by Mussulmans for prayer; and *nisheen* is the Persian word for sitting.

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for manifest malversation. But if he remove him, he is to deprive him of the hire appointed by the appropriator for administering the affairs of the *wukf*. If the person whom the judge has removed should again become good or competent, the governance of the *wukf* is to be restored to him; and if he think fit, he may appoint another to act with him, who will be entitled to part of the salary. Or if the allowance is too small for two, and the judge is of opinion that some further provision should be made for the person appointed with him out of the income of the *wukf* there is no objection to this. When the understanding of the administrator fails him for a year, and he is incompetent to the administration, but subsequently recovers his reason and health, he is to be restored to the administration as before. If it is established to the judge [1] that the administrator is unfit for the affairs of the *wukf*, and he has accordingly dismissed him and put another in his place; and then another judge [1] comes, whereupon the displaced administrator complains to him, saying, 'The judge [1] who was before thee displaced me from the management of the affairs of this *wukf*, without anything being proved against me to entitle him to remove me,' his complaint and his assertion are not to be received; but if this judge is satisfied that he is competent to the administration, he should restore him to it, and assign him the allowance out of the produce. So, also, if he were removed for wickedness and malversation, yet after a time repents towards God, and produces proof that he has become competent, he is to be restored.

may be discharged for malversation.

If a person should make his land a *sudukah*, appropriated for Abdoollah and Zeyd, the produce is for both. When both die, the whole is for the poor; and when one of them dies, his half is for the poor. In like manner,

How the produce is to be distributed when it is for two or more persons.

[1] Though the word *hakim* again occurs in all these places, it seems evident that the same person is meant as is mentioned in the preceding sentences under the name of *kazee*. The citations are from a different author.

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when a class of persons (*kowm*) is named, the produce is to be divided according to the number of heads; and if one dies, his share goes to the poor and the remainder to the survivors. If the appropriator should have said, 'for the child of Abdoollah,' without mentioning a number, so long as there remains a single child of Abdoollah, there is nothing for the poor. If he names Zeyd and Amr, and gives a half to Zeyd, and two-thirds to Amr, the whole is to be divided into seven parts, as in the case of the increase in inheritance, of which three are to be given to Zeyd and four to Amr. And if he say, 'to Zeyd a half, and to Amr a third,' each is to have the portion mentioned for him, and the remainder is to be divided equally between them. If he should say, 'My land is a *sudukah*, appropriated for Zeyd and Amr, and to Zeyd out of it a third, or a hundred *dirhems*,' and is silent as to the other, Zeyd is to have what is named for him, and the remainder is for him of whom nothing has been said. And so in all other cases where one is named, and silence preserved with regard to the other. If he should have said 'to Zeyd out of it one hundred, and to Amr out of it two hundred,' and there is a deficiency of produce, the actual produce is to be divided between them in the proportion of one third and two thirds; while, if there is an excess, it is to be divided equally between them according to the number of heads, and not in the proportion mentioned. But if he had said, 'It is a *sudukah*, appropriated to Zeyd out of it a hundred *dirhems*, and to Amr two hundred,' each is to get what is mentioned for him, and the remainder is for the poor. And if he say, 'A *sudukah* appropriated on condition that Zeyd shall have a hundred and Amr the remainder,' and the produce is no more than a hundred, Zeyd takes it, and Amr has nothing.

When some reject.

When the appropriation is for a class of persons (*kowm*) and they all reject, the produce is for the poor; while, if only some reject, then, if the name of the class be applicable to the remainder, the whole of the produce is to be divided among them, but if the name is inapplicable

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to the remainder, the share of those who reject passes to the poor. Thus, when he has said, 'to the child of Abdoollah,' and some of them reject, the whole is for those that remain. But if he say, 'to Zeyd and Amr,' and Zeyd rejects, his share passes to the poor.

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CHAPTER VI.

OF APPROPRIATION BY THE SICK.

An appropriation by a sick person is valid to the extent of a third of his property, but void as to any excess, unless assented to by the heirs.

When a man who is sick of his death-illness makes an appropriation of his mansion, and the mansion is within a third of his property, or the appropriation is allowed by his heirs, it is lawful. But if the mansion exceeds the third of his property, and the appropriation is not allowed by his heirs, it is void as to the excess above the third. And when a man has made his land 'a *sudukah*, appropriated to Almighty God, for his child and child's child, and his *nusl* for ever, so long as there are any, and after them for the necessitous,' and this land is within a third of his property, it becomes settled, so that its produce is divisible among all his heirs, according to their shares in his heritage;[1] and, accordingly, if he leave a wife and children, an eighth is to be given to his wife, or if he leave both parents and children, a sixth is to be given to his parents, the remainder in either case being divisible among the children, in the proportion of two shares to a male and one share to a female. This is when he has left children of his loins, and no grandchildren. But if he have left both children and grandchildren, the other circumstances of the case being the same, the produce is to be divided according to the number of the heads of his children, and the number of the heads of his grandchildren, and the portions of the children in this division

[1] In the terms of the *wukf* it is for the benefit of only some of the heirs; and a gift on death-bed, or a legacy, to one heir without the consent of the others, is void.

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are to be divided among the heirs, according to the rules of inheritance, and the portions of the grandchildren are to be divided among them equally. And when the children of the loins are exhausted, the produce is to be divided among the grandchildren and their *nusl*, the widow and parents taking nothing. If the land does not come out of the third of the property, but is allowed by the heirs, the appropriation is lawful, and the produce divisible among them equally, without any preference of the male over the female, neither the wife nor the parents taking anything.[1] And if the heirs do not allow it, the appropriation is lawful from a third of the property, and one third of the area [2] becomes *wukf* for the poor,[3] the produce being divisible among all the heirs, according to the rules of inheritance. If one should settle his land on his kindred, and the kindred are his heirs, this and the case where the settlement is on his children are alike. But if they are not his heirs, the settlement on them is lawful, and they are entitled to the produce, according to the terms of the *wukf*.

How the third is to be divided when there is a *wukf* as well as bequests.

When a person during illness has appropriated his land, and also made bequests, the third of his property is to be divided between the *wukf* and the whole of the bequests, in proportion to the value of the land, for the people of the *wukf*, and in proportion to the amount of the legacies for the legatees, and a quantity equal to what may fall to the value of the land is to be taken out of the land, and it becomes *wukf* for the purposes specified. The *wukf* has no preference, being in this unlike emancipation and *tudbeer*, which are to be commenced with before legacies.

Difference between a bequest and a *wukf*.

If he should say, 'The produce of this my land is to be given after my death to the child of Abdoollah and his *nusl*,' it is a bequest of the produce. And, in like manner,

[1] The wife and parents are excluded because they do not come within the terms of the *wukf*.

[2] That is, of the whole of the estate.

[3] Meaning the ultimate destination of the produce after the heirs are dead.

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when he has said, 'Detain (*i.e.* settle) it after my death on the child of Abdoollah,' or, 'My land after my death is settled on such an one and his *nusl*, and is not to be sold,' all these expressions are a bequest of the produce. But if he were to say, 'My land after my death is settled on the poor, or is a *hoobs* on the poor,' this would be a lawful *wukf*.[1]

Appropriation by a sick person in favour of an heir is not valid without the assent of the other heirs.

When a person in sickness has appropriated his land for his child and his child's child, having no other property beside it, one-third of the land is an appropriation for the benefit of the child's child, whether assented to by the heirs or not;[2] and the other two-thirds are the property of the heirs, if the appropriation is disallowed by them; but if it is allowed by them, the two-thirds are to be divided between the child and child's child equally.

[1] The difference between this and the preceding cases seems to be that in the first of them there are no words to constitute a *wukf*, and in the second and third, though the word *wukf*, and its equivalent *hoobs*, occurs, there is no perpetuity.

[2] The child is excluded from the benefit of the third because he is an heir, and a legacy to an heir is not lawful.

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CHAPTER VII.

OF A MUSJID, OR PLACE OF WORSHIP, AND MATTERS CONNECTED THEREWITH.

SECTION FIRST.

How a Musjid is constituted.

How the owner's property in a *musjid* abates.

WHEN a man has erected a *musjid*, his property in it does not abate till he has separated it from the rest of his property, with its way, and permits prayers to be said in it. Separation is necessary, because without that the *musjid* is not made special to Almighty God; and prayer is necessary because delivery is requisite, according to Aboo Huneefa and Moohummud.[1]

A *musjid* is constituted by public worship, with the maker's permission.

If a man should make a *musjid* within his mansion, and permit entrance to it, and prayers to be said in it, the place becomes a *musjid*, in all their opinions, if a way is made to it; but not otherwise according to Aboo Huneefa. According to the other two, however, it becomes a *musjid* and the right of way follows, without any condition to that effect. And if a door were opened to it on the highway, it would become a *musjid*. But if a man should make a *musjid* with an underground grotto below it (*surdab*),[2] or

[1] The *Hidayah* is cited; but in Mr. Hamilton's translation (vol. ii., p. 354) *or* is substituted for *and*, as if separation *or* the permission of prayer were sufficient. Mechanical separation is probably intended; and wherever it already exists, the actual use of the *musjid* for prayer, with the owner's permission, may perhaps be sufficient.

[2] The word is Persian, and signifies, literally, cold water,—a place for keeping water cool in summer.

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a dwelling-house above it, and make the door of the *musjid* opening on the highway, he might sell it, and on his death it would go to his heirs; though if the grotto were for the use of the *musjid* its appropriation would be lawful, as in the case of the *musjid* in Jerusalem.

Public prayers with his permission is delivery.

When an assembly of worshippers pray in a *musjid* with permission, that is delivery. But it is a condition that the prayers be with *izan*, or the regular call, two times or more, and be public, not private. For though there should be an assembly, yet if it is without *izan*, and the prayers are private instead of public, the place is no *musjid* according to the two disciples. But if one person were appointed to officiate both as *mooezzin* and *imam*, and he should make the call, and then stand up and pray alone, the place would become a *musjid* by general agreement.

A *musjid* may also be constituted by delivery to a superintendent, or the judge.

When a *mootuwulee* has been appointed for the purposes of a *musjid*, and delivery of it has been made to him, the *musjid* is lawful, though no prayers be said in it; and this is correct. So also when delivery of it is made to the judge or his deputy. It is also the most correct opinion that a *musjid* may be constituted so as to be obligatory, according to Aboo Huneefa, without any reference to the death of the *wakif*, or making it the subject of a bequest, contrary to the other cases of *wukf*.

A space of ground may be constituted a *musjid* by public worship on it, under a perpetual permission from the owner.

When a man has an unoccupied space of ground fit for building upon, and has directed a *kowm*, or body of persons, to assemble in it for prayers, the space becomes a *musjid*, if the permission were given expressly to pray in it for ever, or, in absolute terms, intending that it should be for ever; and the property does not go to his heirs at his death. But if the permission were given for a day, or a month, or a year, the space would not become a *musjid*; and on his death, it would be the property of his heirs.

Nothing can be a *musjid* in which any one has a right of property.

A sick man has made his mansion a *musjid* and died, but it neither falls within a third of his property nor is allowed by his heirs: the whole of it is heritage, and the making it a *musjid* is void; because the heirs having a right in it, there has been no separation from the rights of mankind, and a confused portion has been made a *musjid*,

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which is void.[1] In the same way as if he should make his land a *musjid*, and another person should establish a right in it confusedly; in which case the remainder would revert to the property of the appropriator; contrary to the case of a person making a bequest that a third of his mansion shall be made a *musjid*, which would be valid; for in such a case there is a separation, as the mansion may be divided, and a third of it converted into a *musjid*. When a man has made his land a *musjid*, and stipulated for something out of it to himself, it is not valid, according to all. It is also generally agreed that if a man make a *musjid* on condition that he shall have an option, the *wukf* is lawful, and the condition void. When a man has built a *musjid*, and called persons to witness that he shall have the power to cancel and sell it, the condition is void, and the place is still a *musjid*; just as if he had erected a *musjid* for the people of a *muhullah*, saying, 'it is for this *muhullah* specially,' when it would, notwithstanding, be for others as well as them to worship in.

Though a *musjid* should fall to decay it cannot be sold.

When a *musjid* has fallen to decay and is no longer used for prayer, nor required by the people, it reverts to the appropriator or his heirs, and may be sold or converted into a mansion; but it has been said that it is a *musjid* for ever, and this is more correct. When of two *musjids* one is old and gone to decay, the people cannot use its materials to repair the more recent, according to either Moohummud or Aboo Yoosuf; because, though the former thought that the materials may be so applied, he held that it is only the original appropriator or his heirs, to whom the property reverts, that can so apply them, and because Aboo Yoosuf was of opinion that the property in a *musjid* never reverts to the original appropriator, though it should fall to ruin and be no longer used by the people. The *futwa* is in accordance with the opinion of Aboo Yoosuf.

[1] See *ante*, p. 573.

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Section Second.

Of Appropriations for the Benefit of a Musjid, and the Administration of the Property belonging to it.

How land may be appropriated for the benefit of a *musjid.*

If a person should desire to appropriate his land for the benefit of a *musjid*, and to provide for its repairs and necessaries, such as oil, &c., in such a manner that he shall not have the power to cancel the appropriation, he should say, 'I have appropriated this my land' (specifying its boundaries), 'with its rights and advantages, as a perpetual *wukf* for my life, and, after my death, that its produce may be received, and applied in the first place to its own repairs, and then to the hire or wages of the persons employed in it, and the defraying of its expenses; and if there be any surplus over this, to expend it on the repairs of the *musjid*, and the supply of its oil, and what else may be required for the advantage of the *musjid*, so far as the superintendent may in his discretion think fit; and when nothing more is required for the *musjid*, to apply what remains to poor *Mooslims*.' And this would be lawful. A man has appropriated his land for the benefit of a *musjid* without any ultimate destination for the poor. 'Our' sheikhs have said, and it is approved, that the appropriation is nevertheless lawful, according to all opinions.

Distinction between a gift and a *wukf* to a *musjid.*

A man gives money for the repairs of a *musjid*, and for its maintenance, and for its benefit. This is valid; for if it cannot operate as a *wukf*, it operates as a transfer by way of gift to the *musjid*, and the establishing of property in this manner to a *musjid* is valid, being completed by taking possession. If a person should say, 'I have bequeathed a third of my property to the *musjid*,' it would not be lawful unless he say, 'to expend on the *musjid*.' So if he were to say, 'I have bequeathed a third of my property to the lamps of the *musjid*,' it would not be lawful unless he say, 'to give light with it in the *musjid*.' If he say, 'I have given my mansion to the *musjid*,' it is valid

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as a transfer, requiring delivery, in the same way as it would be lawful were he to say, 'I have appropriated this hundred to the *musjid*, by way of transfer when delivered to the administrator.' If he should say, 'This tree to the *musjid*,' it would not belong to the *musjid* until delivered to the manager of the *musjid*.

What the superintendent may or may not do with property of the *musjid*.

The superintendent may hire a person for the service of the *musjid* to sweep it, and other the like purposes, at the proper hire for similar work, or even with a moderate excess. But if his accounts are objected to, and he is unable to write, he cannot lawfully hire a person to write them for him at the expense of the *wukf*. He may lawfully erect a *munár* or minaret out of property appropriated for the benefit of the *musjid*, if necessary for the purpose of making the *izan*, or call to prayers, be heard over the neighbourhood; but not so if the *izan* can be sufficiently heard without it. And it is not lawful for him to buy clothes with the property of the *musjid* and distribute them to the poor; and should he do so he is responsible.

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CHAPTER VIII.

OF CARAVANSERAS, CEMETERIES, INNS, RESERVOIRS, WAYS, AND AQUEDUCTS.

How such things become *wukf.*

WHEN a person has erected an aqueduct[1] for Mussulmans, or an inn for the occupation of travellers, or a caravansera, or has made his land a cemetery, his property does not abate, according to Aboo Huneefa, without an order of the *hakim*, or judge, or referring the matter till after death to make it a bequest, when it would become obligatory after his death, though revocable in the meantime, as has been already explained in the case of appropriations for the poor. According to Aboo Yoosuf, the appropriator's property abates by speech, and according to Moohummud, it abates when people have used the aqueduct, or have occupied the inns and caravanseras, or buried in the cemetery; and it is sufficient if one person do so. The rule is the same as to a well and cistern; and if they are delivered to a superintendent the appropriation is valid in like manner. It is stated in the Mubsoot that the *futwa* is with the two;[2] and so it is generally agreed. There is no objection to anyone's drinking from the well and cisterns, and watering his cattle and camels at them, and also using the water for ceremonial ablutions. And in the use of all such things as above mentioned there is no difference between the rich and the poor. So that it is

[1] *Sikayut*, from *suka*, he watered. Freytag restricts this meaning to the word in the plural, and gives as the meaning of the singular, *vas quo irrigatur.*

[2] That is, I suppose, the disciples, as not requiring the order of a judge, &c.; and see *ante*, p. 558.

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lawful for all alike to put up at inns and caravanseras, and to drink from aqueducts, and bury in a cemetery. But the income of a mansion appropriated for *ghazees*, or religious warriors, can be taken only by those of their number who are necessitous. When a mansion is appropriated for the residence of pilgrims, mere wayfarers have no right to occupy it; and when the days of the season have passed it should be let and kept in repair out of the rents, and the surplus, if any, distributed among the poor.

How a place may become a public way.

When a man has bought a place and made it a way for Mussulmans, and called witnesses to the fact, it is valid; but it is a condition of the completeness of the thing that one Mussulman should pass over it, according to those who think delivery necessary. And Hullal has said that the rule is the same as to a bridge which a man has built for Mussulmans, and they have made use of it as a way. The building in consequence does not pass as inheritance to his heirs, but becomes a *wukf*, being specially set apart by the cancellation of their rights.

Of beneficial objects it is better to convert a mansion into a caravansera than to sell and give the price to the poor.

When a man comes to a *mooftee* and says, 'I wish to make an approach to Almighty God. Shall I build a caravansera for Mussulmans or emancipate a slave?' or, intending to make an approach to Almighty God with his mansion, he says, 'Shall I sell it, and with the price buy and emancipate a slave, or shall I bestow the price on the poor, or make my mansion a *wukf* for Mussulmans,—which of these objects is best?' They say that he ought to be answered, 'If you build a caravansera, appropriate it, and assign produce for its repairs, a caravansera is best, for it is most generally beneficial; and the next best thing that you can do is to sell the mansion and bestow its price on the poor. After these it is best to buy a slave and emancipate him.' In the Buzzazeeah, however, it is said that to appropriate an estate is better than to sell it and bestow its price on the poor.

A body once interred may be exhumed

When a body has been buried in the ground, whether for a long or short time, it cannot be exhumed without some excuse. But it may be lawfully exhumed when it appears that the land was usurped, or another is entitled

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for sufficient reasons.

to it under a right of pre-emption. Auzujundee being asked with regard to a *musjid*, for which there no longer remained a congregation, and all around it had gone to decay, whether it was lawful to convert it into a cemetery, answered, 'No;' and being asked with regard to a cemetery in a village, when it had gone to decay, and there remained in it no traces of the dead, not even bones, whether it was lawful to sow the land and take its produce, answered, 'No,' for in legal effect it is still a cemetery.

Khuraj abates from land converted into a cemetery.

A man makes his land a cemetery or an inn,—the *khuraj* abates if the land were *khurajee*; and this is correct.[1]

Land converted into a cemetery may be sold when overflowed by water so as to be useless for sepulture.

When a woman has made a cemetery of part of her land, divesting herself of the property, and has buried her son in it, but the piece of land is unfit for a cemetery by reason of an overflow of water upon it, and she wishes to sell the land,—if it be still in such a state that people desire to bury their dead in it, she cannot sell it; but if they have no such desire, she may. When she has sold it, the purchaser may order the removal of her son's body from it.

A grave made in a public cemetery by a person for himself may be appropriated by another, if there is no available place for sepulture.

A man having dug a grave for himself in a cemetery, can another bury his dead in it? If there be space in the cemetery, it is proper that he should not interfere with the grave; but if there is no other space, he may bury his dead in it. And the case is like that of a man who has opened out his prayer-carpet in a *musjid*, or put up in a caravansera, when another comes, and if there is space enough for him he is not to molest the other.

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[1] *Wukf* land generally is liable to the *khuraj*.—*Land Tax of India*, p. 8.

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BOOK X.[1]

OF WILLS.[2]

CHAPTER I.

DEFINITION, CONSTITUTION, CONDITIONS, AND LEGAL EFFECT OF WILLS; WHO ARE AND ARE NOT COMPETENT TO MAKE THEM; AND WHAT IS REVOCATION OF A WILL.

Definition.

To bequeath is, in the language of law, to confer a right of property in a specific thing, or in a profit or advantage, in the manner of a gratuity, postponed till after the death of the testator.

Constitution.

It is constituted by saying, 'I have bequeathed such a thing to such an one,' or, 'I have bequeathed towards such an one,'[3] or by any other words that are commonly used instead of these.[4] It is proper for a man to make a will when there is no right against him on the part of Almighty God; but it is an incumbent duty to do so when there is such a right; as, for instance,

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[1] *Fut. Al.*, vol. vi., p. 139.

[2] *Wusaya*, pl. of *wusiyut*, a will or bequest. The latter seems to be the meaning commonly attached to the word in India; a will being there usually termed a *wusiyut-nameh*, or writing or letter of bequests.

[3] The difference between the two expressions lies in the prepositions; the first being the possessive *lam*, which signifies that the bequest is for the legatee's own benefit, and the second being the particle *ila*, which indicates that the party to whom the bequest is made is the executor.

[4] *Doorr ool Mookhtar*, p. 818.

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when he has omitted to pay his *zukat*, or poor's-rate; or to fast; or to perform the *hujj*, or pilgrimage to Mecca; or to say the prescribed prayers.

Conditions.

The conditions of a valid bequest are that the *moosee*, or testator, is competent to make a transfer of the property, the *moosa lehoo*, or legatee, competent to receive it, and the *moosa bihee*, or subject of the bequest, something which is susceptible of being transferred after the testator's death, whether it were in existence at the time of bequeathing or not.[1] It is also a condition that the bequest be accepted, either expressly or by implication, which is by the legatee's dying before rejection or acceptance, whereupon his death becomes an acceptance, and his heirs inherit the legacy.[2] There is this difference between testate and intestate succession—that an heir enters upon the possession of inherited property without acceptance, but a legatee does not enter upon the possession of bequeathed property without acceptance.[3] The acceptance of a bequest must be made after the death of the testator; insomuch that if it be accepted or rejected during his life, either act is void, and the rejector is still at liberty to accept after his death. Acceptance may be inferred from conduct, as by paying a bequest, or purchasing something on account of the heirs, or paying debts; in which case the acceptance is as good as if made in express terms.[4]

Legal effect.

The legal effect of a bequest is to confer on the legatee a new right of property, in the same way as in the case of gift, and the bequest becomes vested in him by acceptance; so that if he accept after the death of the testator, his ownership of the thing bequeathed is established, whether he take possession of it or not. If a legatee reject a bequest, it is cancelled, according to 'us.'

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[1] This last addition is from the *Doorr ool Mookhtar*, p. 818.

[2] Death after the testator is implied, for it is a substitute for actual acceptance which must be after his death. It may thence be inferred that the death of the legatee before the testator would occasion a lapse of the legacy.

[3] *Humadeea*, as cited in the Ap. to the *P. P. M. L.*, p. 52.

[4] Acceptance by an executor is evidently meant.

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A bequest to a stranger is valid without the consent of the heirs, but not beyond a third of the estate, unless assented to by them after the testator's death. It is implied that they are of full age, and no regard is had to their permission granted during the lifetime of the testator. When a man bequeaths his whole estate, having no heirs, the bequest takes effect, and there is no occasion for any assent on the part of the *beit-ool-mal*, or public treasury.[1]

A bequest to a stranger is valid to the extent of a third of the property without the consent of the heirs.

A bequest to an heir is not lawful, according to 'us,' without the assent of the other heirs. If it be made to an heir and a stranger, it is valid as to the share of the stranger, and dependent as to the share of the heir on the permission of the other heirs. If permitted by them, it is lawful; and if not permitted by them, it is void—no regard being had to a permission granted in the lifetime of the testator; so that they may afterwards retract.

A bequest to one of them is not lawful to any extent without the consent of the others.

In determining whether a person is an heir or not, regard is to be had to the time of the testator's death. Thus, if a man makes a bequest in favour of his brother, who is his heir at the time, and a son is afterwards born to him, the bequest to the brother is valid; but if at the time of the bequest to his brother the testator has a son who afterwards dies before himself, the bequest to the brother is cancelled.

By heir is meant one who is so at the time of the testator's death.

If the assenting heir, being of mature age, is sick, but afterwards recovers from his illness, the assent is valid; and if he die of the illness, the assent is to be treated in the same way as if it were a bequest; so that, if the original legatee be an heir of the assenting heir, the assent is not lawful unless concurred in by the other heirs of the sick person; but if the original legatee be in the position of a stranger to the sick person, the assent is lawful to the extent of a third of his estate. In all cases where there is any occasion for the assent of heirs, the assent is lawful only when the person who grants it is competent to grant, as, for instance, when he is of mature age and sane mind.

Case of the assenting heir being sick at the time of the assent.

When a person makes a bequest in favour of the

[1] Though it is the *ultimus hæres*.

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Case of a bequest to the *mookatub* of an heir; or to the slayer of the testator.

mookatub of his heir, or the *mookatub* of his slave, the bequest is void. And a bequest to a person who slays the testator, either intentionally or by accident, is not lawful, whether the bequest were made before the death-wound or after it.[1] But if the heirs assent to the bequest, it is lawful, according to Aboo Huneefa and Moohummud. And if the slayer be a youth under puberty, or insane, the bequest to him is lawful without the consent of the heirs; or if the slayer be himself the sole heir, a bequest to him is lawful, according to Aboo Huneefa and Moohummud. A bequest to the *mookatub*, or *moodubbur*, or *oom-i-wulud* of the slayer is also unlawful without the consent of the heirs.

Assent of heirs once given cannot be retracted.

After the heirs have once assented to a legacy in excess of a third of the estate, or in favour of an heir of the testator, or of his slayer, they cannot refuse to deliver the subject of bequest, and may be compelled to make delivery, as the legatee does not take from them, but from the testator.

Case of a bequest to the son of an heir or to the testator's *mookatub*.

It is lawful to make a bequest to the son of one's heir, or to one's own *mookatub*, or *moodubbur*, on a favourable construction of law; so also to the parent or other ancestor, or child, or other descendant of one's slayer, and to the *mookatubs*, *moodubburs*, and absolute slaves of all these.[2]

Bequest by a *Mooslim* to a *zimmee* and *vice versâ*.

A *Mooslim* may lawfully make a bequest to a *zimmee*, or *vice versâ*;[3] but a bequest to an alien who is not a *moostamin* is not lawful. If a *Mooslim* make a bequest to an alien living in a *dar-ool-hurb*, or foreign country, the bequest is not lawful, though the heirs should give their consent. And if the alien should come into the *Mooslim* territory under protection, with the intention of taking his legacy, still he cannot do so even with the consent of the heirs. This is when the testator and the alien legatee were both in the *dar-ool-Islam* at the time. If the testator were also in the *dar-ool-hurb*, 'our' doctors differ as to the legality of the bequest. When the alien

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[1] The slayer of a person is precluded from inheriting to him.

[2] *Doorr ool Mookhtar*, p. 827.

[3] Though difference of religion is an impediment to inheritance.

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is a *moostamin*, residing in the *Mooslim* territory, it seems, on the authority of the Zahir Rewayut, that a bequest to him would be lawful to the extent of a third of the testator's property without the consent of the heirs, and beyond that amount with their consent. But a bequest by a *Mooslim* to an apostate is not lawful.

Bequest by a man in debt to the full extent of his property requires the consent of his creditors.

When a man makes a bequest, being in debt to the full amount of all his property, the bequest is not lawful unless the creditors agree to release the property *pro tanto*.

Persons who are incompetent to bequeath.

A bequest by anyone who is incompetent to a gratuitous act is invalid. Hence a bequest by an insane person, or a *mookatub* or a *mazoon*, is not valid. And if a person is insane at the time of making a bequest, but afterwards recovers from his insanity and then dies, still the bequest is unlawful for want of competency at the time of making it. A bequest by a youth under puberty, whether he be a *moorahik* (that is, approaching to puberty), or not, is unlawful according to 'us.' And it makes no difference whether the youth be permitted to trade or be under inhibition, or whether he die before puberty or after it. So also, though he should say, 'If I arrive at majority, a third of my property is to such an one,' the bequest is not valid for want of competency at the time of making it. But with regard to an absolute slave or a *mookatub*, when they refer a bequest to a time subsequent to their becoming free, it is valid. A will made by a person in jest, or under compulsion or mistake, is not valid.

Persons who are competent to bequeath.

A bequest by a person who is free and sane, whether man or woman, is lawful; so also, the bequest of a person who is travelling and is separated from his property is lawful. If a youth or a *mookatub* make a bequest, and the former after attaining his majority, or the latter after obtaining his freedom, allows it, the bequest is valid, *ab initio*.

Bequests to or of a child in the womb.

A bequest to or of a child in the womb, if born within six months from the date of the bequest, is valid. When a slave is bequeathed with exception of the child of which

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she is pregnant, the bequest and the exception are both valid. When a person makes a bequest to what is in the womb of a woman, and she is delivered after his death, and a month after the bequest, of a dead child, the child is not entitled to the legacy; but if the child be born alive and then dies, the bequest is lawful to the extent of a third of the testator's property, and is divisible among the child's heirs. If the woman should bring forth two children, one dead and the other alive, the living child takes the whole legacy; but if both be born alive and one then die, the legacy is divided into moieties, one for the living child, and the other for the heirs of the dead one. When a person makes a bequest in these terms, 'If there be in the womb of such a person a girl, she is to have a legacy of a thousand *dirhems*, and if there be a boy, I bequeath to him two thousand *dirhems*,' and the woman is delivered of a girl within a day of the six months after the bequest, and of a boy two or three days later, the legacies to both are valid to the extent of a third of the estate. If she should be delivered of four children, two male and two female, the heirs of the testator may select either of the males or either of the females to whom to give the legacy.

Bequests may be revoked by word or deed.

A testator may revoke his bequest, and the revocation may be either express—as when he says, 'I have revoked,' or the like—or implied, as when he does some act from which it may be inferred. Every act which if done on the property of another has the effect of cutting off the proprietor's right in it, has when done by a testator on the subject of his bequest the effect of revoking it; and in like manner every act which occasions an addition to the subject of a bequest, when it cannot be delivered without the addition, has the effect, when done by the testator, of revoking it; and every act of disposal by him which occasions an extinction of his right in the subject of bequest, has also that effect. This being premised, we may say that if a man should bequeath a piece of cloth, and afterwards cut it up and sew it, or cotton, and afterwards spin it into thread, or thread and weave it, or iron,

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and manufacture it into a vessel—in all these cases there is a revocation of the bequest. So also, if he should bequeath fried barley, and afterwards mix it with butter, or bequeath a mansion and then build within it, or cotton and use it in stuffing or quilting, or lining a garment, in all these cases also the bequest would be void.

In respect of revocation, bequests are of four different kinds.

Bequests are of four kinds. The first admits of being cancelled both by word and deed; the second by word only; the third by deed only; and the fourth neither by word nor by deed. The first are specific legacies, which may be cancelled by word, as by the testator's saying, 'I have cancelled the bequest,' and by deed, as by his selling the specific thing bequeathed, or emancipating him when a slave, or otherwise parting with his property in the subject of bequest in such a manner that the parting cannot be cancelled or reversed, as, for instance, by *tudbeer*. The second kind of bequest which can be cancelled by word only, and not by deed, is a bequest of a third or a fourth of the testator's property, which may be cancelled by express words; but, though the testator should part with his property in the share indicated, the legacy would not be revoked, but take effect as to another third. The third kind, which admits of revocation by deed only, and not by word, is restricted *tudbeer*, which, if revoked by deed, as by selling the slave, the revocation is valid, but cannot be validly revoked by words.[1]

Miscellaneous cases.

When a person has bequeathed a piece of silver, and then fashioned it into a ring, or the like, this is a revocation of the bequest according to Aboo Yoosuf, and apparently Moohummud also; but it is not a revocation according to Aboo Huneefa, whose opinion is correct. And if one should sell a specific thing, which he had bequeathed, and then re-purchase it, or make a present of it, and then revoke the gift, the bequest would be void. The slaughter of a bequeathed sheep is the revocation of a bequest of it; but the washing of a bequeathed garment

[1] No example is given of the fourth kind, which cannot be cancelled by word or deed, but the absolute *tudbeer* is probably intended.

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is not a revocation of the bequest. The denial of a bequest is a revocation of it, according to what is stated in the Jamâ, but not so according to a statement in the Mubsoot—the former being the opinion of Moohummud, and the latter that of Aboo Yoosuf, which is the most correct. And if one should say, 'Every legacy to such an one is unlawful,' or 'is *reba*' (usury), that would not be a revocation; but otherwise, if he should say, 'is void.'

A bequest is revoked by a subsequent bequest of the same thing, or the second legatee is made a partner with the first, according to the words employed.

If one should say, 'The slave whom I have bequeathed to such an one is to such an one,' that would be a revocation; for the assertion excludes the idea of partnership. It is otherwise when a man has bequeathed to one person what he had already bequeathed to another; for the subject of a bequest is susceptible of partnership, and the expression (that is, the word 'bequeath,') will bear that construction.[1] And, in like manner, if the testator should say, 'The slave whom I have bequeathed is to such an one my heir,' that would be a revocation of the first bequest, for the same reason, and be a bequest to the heir, which the other heirs may allow or reject as they please. But if the second person were dead at the time of the testator's speaking, the first bequest would remain as before, by reason of the second being void; while, if the second person were living at the time that the testator spoke, and should subsequently die before him, both legacies would be void, and the subject of them revert to the heirs of the testator.

Acts with respect to a bequeathed slave that are or are not a revocation of the bequest.

If one should bequeath his slave and then pledge him, that would be a revocation of the bequest; but not if he let the slave to hire, or have connection with her, being a female; but if he bequeath a piece of iron and then forge it into a sword, that is a revocation. And if one should bequeath his slave to such an one, and then enter into *kitabut* or *tudbeer* with him, or divest himself in any way of his right to the slave, that would be a revocation; insomuch, that if the slave should again become his property, the bequest would not revive. If a person

[1] *Kafee* and *Hidayah*, vol. iv., p. 1440.

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should say, 'The slave whom I bequeathed to such an one, I have also bequeathed to such another,'[1] the slave would belong to both parties in halves. So also if he should say, 'I have bequeathed half of him to such an one,' the slave would be between them both. And if he should bequeath a third of him to such an one, and then say, 'The third which I bequeathed to such an one I have bequeathed half of it to such another;' or say, 'I have bequeathed half of it to such an one,' there would be no revocation of the half from the first, and the third would be between them in halves. But if he should say, 'The third which I have bequeathed to such an one I have also bequeathed a half of it to such another,'[2] the first legatee would have only a third of the third.[3] And if one bequeath something, and then say, 'What I bequeathed to such an one I have bequeathed half of it to such another, it will be between both,' that would be a revocation as to half.

Expressions by which the subsequent legatee of a thing is made a partner with the first.

If one should bequeath a mansion, and then put plaster[4] on it, or pull it down, that would not be a revocation; but if he were to bedaub it over with mud, that would be a revocation if done largely. If he should bequeath land, and sow it with vegetables, that would not be a revocation; while, if he makes a vineyard of it, or plants trees on it, the bequest is revoked.

What does and does not amount to revocation of a bequest of a mansion or land.

When a person has bequeathed a thousand *dirhems*, or a slave, or a garment, belonging to another, and he allows the gift before or after the death of the testator, he may revoke it at any time up to actual delivery to the legatee. But when he has made delivery the legacy is lawful. For the legacy of another's property is like the gift of it, and is not valid without delivery and taking possession.

The bequest of another's property may be revoked at any time up to delivery.

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[1] Literally, 'and (*wa*) I have bequeathed to such another.'

[2] Literally, 'and (*wa*) I have bequeathed a half of it.'

[3] The third being bequeathed to both, each has a half of it; but the second legatee has another half, or, together, two parts out of three, and consequently the first legatee has only one part, or a third of the original bequest.

[4] Arab. *Juss* (plaster of Paris). Probably whitewashing is all that is meant.

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CHAPTER II.

OF WORDS THAT CONSTITUTE BEQUEST, AND WORDS THAT DO NOT CONSTITUTE IT: AND WHAT THINGS MAY AND MAY NOT BE THE SUBJECT OF A LAWFUL BEQUEST.

Appointment of an executor.

WHEN a person says to another, 'Thou art my agent after my death,' he becomes his executor (*wusee*); and if he should say, 'Thou art my executor during my life,' he becomes his agent. If one should say to another, 'To thee is the hire of a hundred *dirhems*, on condition that thou wilt be my executor,' the condition is void, and the hundred is a lawful bequest; he is also the executor. When a person in sickness says to another (in Persian), 'Attend to my children after me,' this is making him the executor of his estate. A person says to his brother, 'Hire such an one to give operation to my will;' the brother is the executor, if he accepts. When a sick person says to another, 'Pay my debts,' he becomes his executor.

Distinction between a bequest and an acknowledgment of debt;

Ben Sumaût has reported, as from Moohummud, that when a man has said, 'Bear witness that I have bequeathed a thousand *dirhems* to such an one, and I have bequeathed that to such an one there is a thousand *dirhems* in my property,' the first thousand is a legacy, and the second an acknowledgment of debt. And in the Asul, when a man has said in his will, 'A third of my mansion to such an one,' the author remarks,—I allow that this is a bequest; but if he should say, 'A sixth *in* my mansion to such an one,' it would be an acknowledgment. To the same effect, if a person should say, 'To such an one a thousand *dirhems* from my property,' it would be a

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bequest, on a favourable construction; while if he should say, 'in my property,' it would be an acknowledgment. When a person has said, 'This my slave to such an one, and this my mansion to such an one,' without using the word *bequest*, and there is no mention of bequests, nor of the words 'after my death,' the expressions constitute a gift, both by analogy and on a favourable construction; and if possession be taken during the life of the donor, the gift is valid; but if possession is not taken of it till after his death, the gift is void. If a person should say, 'I have bequeathed that a third of my mansion be given to such an one after my death,' this is a bequest, and possession during the lifetime of the testator is unnecessary. So also, when one, whether in sickness or in health, has said, 'If any event should happen to me, then so and so to such an one,' this is a legacy, death being understood by 'us' as the event alluded to. So also, if he should say, 'To such an one a thousand *dirhems* from my third,' this would be a bequest, though no allusion is made to death. But if the words were, 'To such an one from my property,' or 'from the half,' or 'the fourth of my property,' they would be of none effect, unless uttered in connection with bequests; in which case they would constitute a legacy. When a person has said, 'If I die on this my journey, to such an one there is against me a debt of a thousand *dirhems*,' it is a bequest out of his third.

or a gift.

If a person should direct by his will that his body after his death is to be carried to a certain place, and there interred, and that a caravansera is to be erected at the place, Abool Caim has said that the bequest is lawful as to the caravansera, but is void as to the removal of the body; and that, if the executor should incur any expense in removing it, without the sanction of the heirs, he will be responsible for the amount expended, though, if he has their authority for the removal, he does not incur any responsibility. A direction by will to ornament the testator's tomb is void. But with regard to a direction to provide food for mourners after the testator's death, and for those who may be present at his funeral, the lawyer

Directions regarding funeral.

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Aboo Jaafur has said that it is lawful so far as a third of the estate, and that all may lawfully partake of the provision who prolong their stay at the funeral, or who come from a distance; but that if there is any lavish expenditure in the preparations, the executor is liable for the excess. According to another authority, a direction by will to provide food for three days after the testator's death is void. If a person should direct that a thousand *deenars*, or ten thousand *dirhems*, be expended on his shroud, no more than a medium expense is to be incurred on that account. And if a woman should direct her husband to pay for her shroud out of the dower due to her by him, it has been said that whatever she may direct or forbid on that subject is alike void. When a person directs that he shall be buried in his mansion, the bequest is void, unless he direct the mansion to be converted into a general cemetery for *Mooslims*. A direction that the testator's grave be plastered, and a vault or arch placed over it, is unlawful, except in places where such precautions are required against the ravages of wild beasts. So, also, a direction that so much of one's property be given to persons for reading the Korán over the testator's grave is void, even (it would seem) though special readers be appointed for the purpose.

Bequests for pious and charitable purposes.

If a person should bequeath a third of his property to the Holy Shrine,[1] the bequest is lawful, and the third should be expended upon its buildings, lamps, and the like. So, also, the bequest of a third of one's property to be laid out on a *musjid* is lawful, and the third should be expended on its buildings and lamps. And when a bequest is made 'to fight in the way of God' on the part of the testator, maintenance is to be given to a *ghazee*, or religious warrior, for his sustenance in going, and returning, and remaining with an expedition; but no part of it is to be expended on his family, and if there is any surplus it must be restored to the heirs. Though the warrior be

[1] *Beit-ool-Mookuddus*, generally applied to Jerusalem or the Mosque of Omar, which is commonly supposed to be on the site of Solomon's Temple.

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rich, that is no objection; and the executor himself, or the son of the testator, may fight on his account. In the Nuwadir it is reported as from Aboo Yoosuf, that when a person has bequeathed a third of his property for shrouds to *Mooslims*, or digging their graves, or aqueducts for them, this is void; but a bequest for the like purposes for poor *Mooslims* is lawful. And it is lawful for a *Mooslim* to make a bequest to poor Christians, for that is no sin, —in opposition to building a church for them, which is sinful, and he who assists in building churches for them is a sinner. When a man has bequeathed his land to be made a burying-ground for the indigent, or a *khan* or inn, for passers-by, the bequest is void, according to Aboo Huneefa. But he may lawfully will that it be made a *musjid*, without any difference of opinion. When a person has bequeathed a third of his property to Almighty God, the bequest is void, according to Aboo Huneefa; but Moohummud has said that it is lawful, and to be expended on good objects, and decisions are given according to his word, the bequest being expended on the poor. If one should bequeath a third of his property 'in the way of Almighty God,' Aboo Yoosuf has said that the bequest is to be understood as meaning religious warfare; and though Moohummud has said that if the bequest be given to a *hajjee*, or pilgrim to Mecca, it is lawful, yet the *futwa* is in accordance with the opinion of Aboo Yoosuf. When the bequest of a third of one's property is made for good purposes (*woojooh-ool-kheir*), it may be expended in erecting bridges, or *musjids*, or for students of learning. When a bequest is made to a *rabat* or caravansera in which there are persons residing, and there is anything to show that he intended the bequest for them, it is to be so applied, and is not to be expended on the buildings. When a person has said, 'I have bequeathed a hundred *dirhems* to such a *musjid*, or such a bridge,' the bequest is valid according to Moohummud, and should be laid out in repairing and improving it; but, according to Ben Ziyad, when no mention has been made of repairs and improvements, the bequest is void; and the *futwa* is in accordance with his opinion.

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CHAPTER III.

OF THE BEQUEST OF A THIRD OR OTHER PART OF THE PROPERTY, AND OF A SON'S OR DAUGHTER'S SHARE, AND THE LIKE.

When a third is bequeathed to each of two persons, it is divided between them equally.

WHEN a man has bequeathed a third of his property to one person, and a third of it to another, and both bequests are allowed by the heirs, the legatees have two thirds, and the heirs one third; and if the bequests are not allowed by them, the legatees have the third between them in halves.[1]

Legatee of a third, or less than a third, shares in proportion to his bequest

If a man should bequeath a third of his property to one of two persons, and a sixth of it to the other, the legatees have the third between them in thirds, one part to the legatee of the sixth, and two parts to the legatee of the third.[2] In these cases there is entire unanimity of opinions.[3]

Legatee of more than a third takes in proportion to a third,

When a man has bequeathed a fourth of his property to one person, and a half of it to another, and both bequests are allowed by the heirs, the legatee of the half takes a half, and the legatee of the fourth takes a fourth, and the residue is to the heirs, in proportion to the shares appointed for them by Almighty God. When the heirs do not allow the legacies, they are valid from the testator's third, which is to be divided among the legatees in seven parts, four of which are for the legatee of the half, and three for the legatee of the third. This was the opinion of Aboo

according to Aboo Huneefa; and in

[1] *Hidayah*, vol. iv, p. 1440; *Inayah*, vol. iv., p. 570.
[2] *Ibid.*
[3] *Doorr ool Mookhtar*, p. 823.

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Huneefa. But, according to Aboo Yoosuf and Moohummud, the third of the property should be divided into three equal parts, and two of them given to the legatee of the half, and one to the legatee of the fourth. The division of the third is into seven parts, according to Aboo Huneefa, because the legatee of the half can share only for a third—(since the excess above a third is unlawful, and cannot be taken into account);[1] while the legatee of the third shares for the full third. It is, therefore, necessary to find a number divisible by three and four. Twelve is such a number; and a third of twelve being four, and a fourth of it three, and four and three making seven, that is the number of parts into which the third is to be divided. The remaining two-thirds (or the portion of the heirs) must accordingly be fourteen; and the whole of the estate is thus divided into twenty-one parts, of which seven are to the legatees in the manner above mentioned, and the remainder to the heirs. The division of the third is into three parts, according to the disciples, because, in their opinion, the legatee of the half is entitled to share in proportion to the full half, while the legatee of the fourth shares in proportion to a fourth; which being the half of a half, the whole is divided into four parts, two of which are taken by the legatee of the half, one by the legatee of the fourth, and the remaining fourth part is divided between them in the same proportion—that is, two parts to the former, and one part to the latter.

proportion to his bequest, according to the disciples.

The principle of Aboo Huneefa, that the legatee of more than a third shares only in proportion to a third, is subject to three exceptions. The first is a bequest of emancipation. The second is a bequest in *muhabat*.[2] The third, a bequest of *moorsullah*, or absolute *dirhems*, that is, *dirhems* which are not particularized nor described as part of the estate.[3] The first exception is thus ex-

Exceptions to Aboo Huneefa's principle.

[1] *Hidayah*, vol. iv., p. 1441.

[2] The word means, literally, 'mutual gift.' It is illustrated a little farther on, and more fully explained, p. 652.

[3] *Kifayah*, vol. iv., p. 1441.

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plained:—A man bequeaths their liberty to 'these two slaves,' one of whom is valued at a thousand *dirhems*, and the other at two thousand, and having no other property than the slaves,—if the heirs allow the bequests, both the slaves are emancipated together; but if they disallow them, the emancipations can take effect only so far as the testator's third, which, being supposed to be a thousand *dirhems*, that thousand is to be apportioned to the slaves according to their respective values, two-thirds being for the slave whose value is two thousand, and one-third for the slave whose value is one thousand, each slave having to work out his freedom for the remainder of his value by emancipatory labour. The second exception of a bequest in *muhabat* may be illustrated by the case of two slaves, one of whom is valued at eleven hundred *dirhems*, and the other at six hundred *dirhems*, and the testator has directed by his will that one of them shall be sold to a particular person for a hundred *dirhems*, and the other to another person for a hundred *dirhems*. Here, the benefit by the *moohabat* to the first person is a thousand *dirhems*, and the benefit by it to the second is five hundred *dirhems*; and they, accordingly, divide the third of the estate, whatever it may be, in the proportion of these two sums. In like manner, in the case of *moorsullah*, or absolute *dirhems*, if the bequest to one be a thousand, and to the other two thousand, the third of the property being only a thousand, each legatee takes in proportion to the full amount of his legacy, and the thousand is divided between them accordingly. In all these cases, the legatee takes in proportion to the full amount of his legacy, because, *primâ facie*, it is valid, since the testator may have left so much other property, that this amount may come within a third of it.[1] And all are agreed that, when each one of several legacies does not exceed a third of the property, as, for instance, when a third is bequeathed to me and a fourth to another,

[1] This reason, and what follows, would apparently apply to all specific legacies, but it is expressly stated above that there are only three exceptions to Aboo Huneefa's principle.

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and the heirs do not allow both, each legatee is entitled to a share in proportion to the full amount of his legacy, whatever it may be, and the third is to be divided among them accordingly.

Indefinite bequest.

When a person has bequeathed to another something, or a portion out of his property, or some of his property, the explanation of his meaning rests with himself while he is alive, and with his heirs after his death. And if he should bequeath a share (*suhum*), or part (*joozâ*), the heirs are to be told to give what they please. This is founded on the common acceptation of the word *suhum*; but it is said in the Mubsoot that the legatee of a *suhum* should have an equivalent to the smallest share of the heirs,[1] provided, according to the disciples, that it does not exceed a third, the reports of Aboo Huneefa's opinion being contradictory. When a person has bequeathed a *suhum* of his property, and has no heirs, the legatee takes a half; for the *beit-ool-mal*, or treasury, is in the place of a son, and the case is as if he had left two sons, when the estate would be equally divided between them.

Bequest of the like to a son's or daughter's portion.

If a person should bequeath his son's or his daughter's portion, when he has a son or a daughter, the bequest is not valid; because he is, in fact, giving away what belongs to another.[2] But if he has neither son nor daughter the bequest is lawful. And if the bequest is 'of the like of his son's or daughter's portion,' the bequest is lawful, though he should have a son or a daughter; for the like of a thing is not the thing itself, but something different. The son's portion is then to be ascertained, and an equal amount given to the legatee; but if that should exceed a third of the estate, the bequest requires the consent of the heirs, while, if it be only equal to or less than a third, it is lawful without their consent; as, for instance, if there be but one son, the legatee's portion is a half, if allowed by the son, and only a third if disallowed by him; and if there be two sons, they and the legatee take each a third

[1] *Suhum* is the technical name of an heir's portion.

[2] *Hidayah*, vol. iv., p. 1442.

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of the estate, without any necessity for their allowance. Where, again, the bequest is for the like of a daughter's portion, and there is but one daughter, the legatee is entitled to half of the property if allowed by the daughter, or a third if disallowed by her. And if there be two daughters, and the other circumstances of the case are the same, the legatee's portion is a third. If one should bequeath 'the portion of a son, if there had been one,' the effect would be the same as in the case of the bequest 'of the like of a daughter's portion,' and a half be given to the legatee, if allowed by the heirs. And if the terms of the bequest were, 'the like of a son's portion, if there had been one,' the legatee would have a third of the property.

Of the portion of a son, if there had been one.

A man dies (said Moohummud), leaving a mother and a son, and having bequeathed to another person 'the portion of a daughter, if there had been one,'—in this case the estate is divisible into seventeen parts, whereof five are to the legatee, two to the mother, and ten to the son. To explain this case, it is necessary first to take it as if there were no legacy, and then the estate would be divisible into six shares, whereof the mother would have one, and the son the remaining five. The bequest of a daughter's portion, if there had been one, requires an addition to be made of such a share, which, being half that of a son, the addition must be two shares and a half, which would make the whole eight and a half, or doubling them to get rid of the fraction, seventeen shares, whereof the legatee takes first five shares, for the legacy is here less than a third of the estate, and takes precedence of the heirs; and of the remaining twelve shares, one-sixth, or two shares, are given to the mother, and the other ten to the son.

Of the portion of adaughter, if there had been one.

And if a person should leave a wife and son, and make a bequest of the share of another son if there had been one, the estate must be arranged into fifteen shares;—supposing the heirs to assent to the legacy. Of these the legatee would take seven shares, the wife one share, and the son seven shares. Here, as in the last case, let us first suppose, that there was no legacy, and on

Distinction between 'like to' and 'if there had been one.'

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that supposition the estate would be divided into eight parts, whereof the wife would take one and the son seven. But now, taking the legacy as the share of another son if there had been one, we must add seven more to the number of shares, thus making them up to fifteen. In this case, however, as the legacy is more than a third of the whole estate, the assent of the heirs is made a condition without which the legacy would not be lawful. When a person has died leaving a daughter and a brother and has bequeathed to another person the share of a son if there were one, the legatee has two thirds of the estate, and the other third is divided between the daughter and brother in halves; that is when the heirs consent to the legacy; but if they do not consent, the legatee has only one third, and the other two thirds are to be divided equally between the daughter and brother. When, again, the bequest is of a like to the share of a son if there were one, and the other circumstances are the same, the legatee has two-fifths of the property if assented to by the heirs. When, again, a person has died leaving a brother and sister, and has bequeathed to another person the share of a son if there were one, and the bequest is allowed by the heirs, the legatee takes the whole propery, leaving nothing to the brother and sister,[1] while if he had bequeathed 'the like of the share of a son if there were one,' and the heirs had allowed the legacy, the legatee would only have a half,[2] and the other half would be divided between the brother and sister in thirds (that is two portions to the male and one to the female). In both cases if the legacy were disallowed by the heirs, the legatee would only have a third, while the other two thirds would be divided in the same way between the brother and sister.

When a person has said, 'A sixth of my property to Bequest of two por-

[1] Because if there had been a son he would have taken the whole of the property.

[2] 'Like to' implies that there is another share to which the bequest is like—that is the share of a son—in which case the legatee's portion would be only a half.

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tions to the same person.

such an one,' and then says, at the same or a different meeting, 'a third of my property to him,' and the heirs consent, he is entitled to a third of the property—that is, to no more than a third though they consent, because the sixth is comprehended in the third,—whether it precedes or follows. And if a person should say, 'A sixth of my property to such an one,' and then say at the same or another meeting, 'a sixth of my property to such an one,' he would have only one-sixth, unless there is evidence that another sixth was intended.[1]

Bequest of a third of things, part of which subsequently perish.

When a man bequeaths a third of his *dirhems* or a third of his flocks, and two-thirds of them happen to perish, leaving what remain no more than a third of his property, the legatee is entitled to the whole of the remainder. But if the bequest were of a third of his clothes, and two-thirds were to perish, still leaving the remainder less than a third of the whole property, the legatee would be entitled to no more than a third of the remainder. It is said, however, that this applies only to clothes of different kinds; for if all the clothes be of one kind, the case is to be treated in the same way as that of the *dirhems*. In like manner all things estimated by weight or measure of capacity are to be treated in the same way as *dirhems*, but mansions of different kinds are like clothes of different kinds, according to Aboo Huneefa.

When a money legacy should be paid.

When a man bequeaths a thousand *dirhems*, and leaves actual property and outstanding debts due to him, the legacy is to be immediately paid if it do not exceed a third of the actual property; but if it exceed a third, one-third is to be delivered to him, and as the debts come in he is entitled to take a third out of every payment until his legacy is paid in full.

Joint legacies of a third

If a man should bequeath a third of his property to Zeid and Bukr, Bukr being dead at the time, whether with

[1] *Hidayah* and *Kifayah*, vol. iv., p. 1444, *Inayah*, vol. iv., p. 575, and *Doorr ool Mookhtar*, p. 823. The cases seem equally applicable to two money legacies of unequal or equal amount; and the 'same or a different meeting' may very well be held to include a will and its codicil.

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or without the knowledge of the testator, or to Zeid and Bukr if he be alive, he being in fact dead, or to him and to the person in this house, no one being in the house, or to him and to his posterity (*ukub*), or to him and to a child of Bukr, and his child dies before the testator, or to him and to the poor of his children, or to him who may become poor of his children, and the condition fails at the time of his death, the whole legacy is to Zeid, in all of these cases; for the non-existing or the dead can have no right, and, there being no one to contend with Zeid, the legacy is the same as if it were to him alone. With regard to the case of Zeid and his posterity, as they are to follow him after his death, they are to be considered as non-existing at present.[1] In all these cases, the competitor with Zeid is out of the contest from the beginning; but if he were at first competent to contend with him, and should subsequently become disqualified by failure of a condition, Zeid would have only a half.[2] Thus if a person should say, 'A third of my property to Zeid and Bukr, if I die, he being alive or poor,' and the testator dies when Bukr is dead or rich; or if he should say, 'to him and to Bukr if he be in the house,' and he is not in it; or, 'to him and the children of such an one if they become poor,' and they do not become poor till the testator dies; or 'to him and to his heir,'—in all these cases the legatee has only half of the third.[3] The principle in these cases is that when the person conjoined with another has entered into a bequest,[4] and then comes out of it by the failure of a condition, he does not occasion any accession to the right of the other, and that when he has not entered into the bequest for want of personality or competence (*ahleeut*), the other takes the whole.[5] And if one should say, 'A third of my property between Zeid and Bukr,' Bukr being dead at the time,

where an interest which fails before the death of the testator, goes to the survivor.

Where the interest lapses to the testator.

[1] The *Kafee* is the authority cited.
[2] *Doorr ool Mookhtar*, p. 824.
[3] The *Kafee* is cited.
[4] Or, in the language of English law, 'when the legacy vests.'
[5] *Doorr ool Mookhtar*, p. 824.

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Zeid would have only a half of the third, because the word 'between' implies a division in half, insomuch that if he were to say, 'between Zeid,' and then stop, Zeid would have a half also.[1] Yet if one should say, 'A third of my property between the sons of Zeid and the sons of Bukr,' and one of them has no sons, the whole third belongs to the sons of the other. If one should bequeath a third of his property 'to Zeid and to Amroo,' or should say, 'between Zeid and Amroo,' and should then die, and one of the legatees should die after him, half of the third would belong to the survivor, and the other half of it to the heirs of the deceased legatee. So, also, if one of them should die after the testator, but before acceptance of the legacy, and the survivor should then accept, both legatees would be entitled to the bequest. But if one of them should die before the testator, the share of the legatee so dying would revert to the testator.[2]

Joint legacies of a third to one person, and a class of persons by a general description.

When a person says, 'A third of my property to such an one, and to whomsoever may become poor of the children of Abdoollah,' and then dies, all the children of Abdoollah being rich at the time, 'such an one' gets the whole third. But if some of them should become poor before the death of the testator, the third would be divided between 'such an one' and the poor children of Abdoollah, according to the number of heads (*per capita*). If, again, the children of Abdoollah had never ceased to be poor from the time of their birth to the death of the testator, it would seem that none of them would be entitled to any part of the third, but that the whole of it would devolve on the other legatee, 'such an one.' If the children

[1] *Doorr ool Mookhtar*, p. 825.

[2] The distinction between this case and that of the bequest 'to Zeid and to the child of Bukr' (p. 643), where, if the child dies before the testator, the whole legacy goes to Zeid, will be better seen a little farther on. In that case, the legatee not being specially indicated, the legacy is referred to the death of the testator; so that at the time of the bequest there is no one to contest with Zeid. But here the legatee being actually named, the legacy is special to Amroo and has reference to the time of the bequest; so that there is a competitor from the beginning. See next page.

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of Abdoollah in existence at the time of the bequest should die, and other children be born to him, who at first being rich should become poor before the death of the testator, the third would be divided between them and between 'such an one,' according to the number of heads. So, also, if the terms of the bequest were, 'A third of my property to such an one, and to the child of Abdoollah,' and the child of Abdoollah dies, but another is born to him before the death of the testator, the legacy is between 'such an one' and that child of Abdoollah. And if one should say, 'A third of my property to such an one, and to the offspring of Abdoollah,—these if they become poor,' and they do not become poor till the death of the testator, 'such an one' is entitled to a share of the third, regard being had to the number of heads.

Legacy in excess of a third.

When a woman dies, leaving a husband, and having bequeathed half of her property to a stranger, the bequest is lawful, and the husband entitled to a third, and the legatee to a half; which leaves a sixth to the *beit-ool-mal.* For the legacy to a stranger has precedence to the extent of a third over the rights of the heir, and there remain two thirds of the property to be divided as inheritance. Of this, one-half, that is, a third of the whole, belongs to the husband, leaving a third for which there is no other heir entitled to claim it. The remainder of the legacy therefore becomes operative against it,[1] and that being a sixth, the legacy is raised to a half, while there being no heir entitled to the remaining sixth, it falls to the *beit-ool-mal.* In like manner, if a man should die, leaving a wife, and having bequeathed all his property to a stranger, and the widow should refuse her sanction to the bequest, she would be entitled to a sixth of the property, and the legatee to the remaining five-sixths. For he is entitled to a third by virtue of the bequest, and of the remaining two-thirds the widow takes a fourth, which is equivalent

[1] The prohibition against bequeathing beyond a third exists solely for the benefit of the heirs, and when there are none, the legacy is good for the excess.—*Sirajiyyah* and *Shureefea*, p. 12.

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to a sixth of the whole, and the legatee the remainder, since he is preferred to the *beit-ool-mal.*

Rule as to general and special designation of legatees.

When a man bequeaths a third of his property to the sons of 'such an one,' and the person has no son at the date of the bequest, but sons are subsequently born to him, after which the testator dies, these sons are entitled to the third. And even though the person had sons at the date of the bequest, yet if they were not mentioned by their names, as Ahmud, Zeid, and Bukr, or otherwise distinctly indicated by saying, 'these,' the bequest would be to the sons existing at the time of the testator's death. So that if those in existence at the date of the bequest should die, and others are subsequently born, who are living at the time of the testator's death, these are entitled to the third of the property. If, however, the existing sons are mentioned by name, or are otherwise distinctly indicated, the bequest is only to them, and becomes void in the event of their death. Thus when legatees are named, or otherwise distinctly indicated, the bequest to them is said to be special, and regard must be had to the time at which it was made.

Rule as to general and special description in bequests.

When a man who bequeaths a third of his property has no property at the time of the bequest, the legatee is entitled to a third of whatever he may be possessed of at the time of his death. But if the bequest be specific, or of some particular kind of property, as a third of his flocks,[1] and they all perish before his death, the legacy is void, insomuch that if he should afterwards become possessed of other flocks, or another specific thing of the same kind, the right of the legatee would not attach to the subsequent acquisition; yet if he had no flocks at the date of the bequest, but afterwards acquires them, and then dies, the bequest is valid. And if he should say, 'a sheep from my property,' and have none, the value of a sheep must be given. If the bequest were only of a sheep, without the addition of words referring it to his property, the bequest, according to some, would be valid, while

[1] *Ghunum*, which includes sheep and goats.

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according to others it would be invalid. But if the expression were, 'a sheep from my flocks,' and the testator had no flocks, there is no doubt that the bequest would be void. And in like manner with regard to other kinds of property, such as cows, camels, and the like. When a person says, 'I have bequeathed to thee a sheep from my property,' the bequest is not confined to the sheep that he may have at its date, but applies to the sheep that may be among his property at his death; and since this is the case, if the testator should afterwards die, leaving property comprehending sheep, with other things, the heirs are at liberty to give one of the sheep or its value. There is nothing in the books as to the sheep's being of the best, worst, or medium quality; but according to a report of Husn-bin-Ziyad, the companions (of the Prophet) were of opinion that the heirs might, in such a case, either give a sheep of medium quality or its value. When a person says, 'My roan Turkish horse is a bequest to such an one,' these words are held to refer to a horse then in his possession, not to one which he may afterwards acquire. So, also, if the expressions were, 'my blind slave,' or, 'my Sindian or Abyssinian slave;' while if the terms of the bequest were only, 'my slave to such an one,' or 'my Turkish horse to such an one,' without further addition or qualification, it would include his property at the time and his subsequent acquisitions.

Distribution of bequests made indefinitely among classes of persons.

When a person says, 'This cow for such an one,' according to Aboo Nusr, the heirs would have no right to give its value, but if it were bequeathed to the poor, it would be lawful for them to bestow its value in charity.

When a man bequeaths a third of his property to his *oom-i-wuluds*, being three in number, and to *fakeers* and *miskeens* (beggars and indigent persons), the first take three parts out of five, the *fakeers* one part, and the *miskeens* one part, according to Aboo Huneefa and Aboo Yusuf. And if a man should bequeath 'a third of his property to such an one and to *miskeens*,' the former takes half, and the latter take half, according to the same authority. When a person bequeaths a third to the poor,

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it may be expended, according to the same authority, on one poor person; but Moohummud thought that there must be at least two poor persons.

Bequest to one person and then to another, as partner with him.

When a person bequeaths a third of his property to one man, and then says to another, 'I have made you a partner and joined you with him,' the third belongs to them both, And if, after bequeathing to one man a hundred, and to another a hundred, he should say to a third, 'I have made you a partner with them,' the person addressed would be entitled to a third of each hundred.

Joint bequest where one of the persons is an heir of the testator.

When a man makes a bequest to a stranger and his heir, the stranger takes half the bequest, and the remainder is void; and, in like manner, if the bequest be to a homicide and a stranger.[1] This is contrary to the case of an acknowledgment; for if one were to acknowledge a specific thing or a debt in favour of his heir and a stranger, the acknowledgment would be void as to the stranger also.

Uncertainty as to legacy, how remedied.

When a person bequeaths a beast or a garment, the heirs may give the legatee any beast or any garment they please. And when he bequeaths a part or a share of his property, the explanation is with the heirs, who are to be directed to give what they please. A person having three garments, one good, the other middling, and the third bad, bequeaths them to three different legatees: one of the garments is then lost or destroyed, but which of them is not known, and the heirs refuse to make delivery of the remaining garments to any of the legatees, saying, to each of them, 'The garment in which you had a right has been destroyed,' in these circumstances, since the parties entitled are unknown, and ignorance of this fact prevents the validity of any judgment that may be pronounced in the matter, and the attainment of the testator's object, the bequests must be pronounced to be void, unless the heirs

As to legatee invalidates the legacy.

[1] Heir and homicide of the testator are meant. They are competent to take the legacy with the consent of the heirs (*ante*, p. 626), and therefore included with the co-legatee from the beginning.—*Doorr ool Mookhtar*, p. 826.

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will deliver up the remaining garments. If they should do so, the objection is removed, and the legatee of the best is entitled to two-thirds of the better of the remaining garments; the legatee of the middling garment is entitled to the remaining third of the better and a third of the worse; while the legatee of the worst is entitled to the remaining two thirds of the worst garment.

Rules as to an accretion to the subject of bequest.

An increase, such as a child, produce, grain or the like, that arises out of the subject of a bequest before the death of the testator, is his property, and subject to the same liabilities as the rest of his estate. An increase that occurs after his death and the partition or distribution of his estate belongs to the legatee. An increase that occurs between these events, or after the testator's death and before partition, may occur either before or after acceptance of the legacy by the legatee. In the former case, it is a legacy, because it is an accessory to the original subject of bequest, and must come out of the third of the estate, that is, is valid only if it falls within the third. But is it so in the latter case, also, that is, when it occurs after acceptance and before partition? On this point Moohummud has not left any express *dictum*; but Koodooree has related that, in this case, the increase is not a legacy, and comes out of the whole of the property. Our sheikhs, however, have said that it is a legacy, and must come out of the third.[1]

Illustration.

When a person has bequeathed to another a female slave, who after the death of the testator, but before a partition of his estate, is delivered of a child, and mother and child come within a third of his estate, they both belong to the legatee. If they exceed the third, effect is to be given to the legacy, in the first place, as against the mother, and then as against the child, according to Aboo Huneefa; but against both equally, according to the two disciples. Thus, suppose that the testator has left six

[1] The statement of the general proposition is somewhat enlarged from the original, which is rather obscure, but it is borne out by the illustrations.

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hundred *dirhems*, and a female slave of the value of three hundred *dirhems* more, that he has bequeathed the slave, and that after his death, but before the partition of his estate, she is delivered of a child, which is also valued at three hundred *dirhems*,—in these circumstances (the principal and accessory bequests amounting, together, to six hundred *dirhems*), the legatee is entitled to the mother and one-third of the child (making, together, four hundred *dirhems*, or a third of the whole), according to Aboo Huneefa; while the legatee is entitled, according to the two disciples, to two-thirds of each. This supposes that the child is born before acceptance of the original bequest by the legatee, as well as before partition. If the child is born after acceptance and after partition, it belongs to the legatee; and if it is born after acceptance but before partition, Koodooree has related that it is not a bequest, and is good as against the whole estate, belonging to the legatee in the same manner as if it were born after partition; while 'our' sheikhs have said that it is a bequest, and to be regarded as coming out of the third, in the same way as if it were born before acceptance. If the child is born before the death of the testator, it never comes within the bequest, but is subject to the same rules as the rest of the deceased's property. A man, having a female slave of the value of three hundred *dirhems*, bequeaths her to another, and then dies, leaving no other property. His heirs sell her in the absence of the legatee, and she bears a child while in the possession of the purchaser, of the value of three hundred *dirhems*. The legatee then comes and refuses to sanction the sale. In these circumstances, the purchaser is entitled to two-thirds of the mother and two-thirds of the child; while the legatee takes the remaining third of the mother and a ninth of the child, the other two-ninths reverting to the testator's heirs.

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CHAPTER IV.

OF EMANCIPATION, MUHABÁT, AND OTHER GRATUITOUS ACTS ON DEATH-BED; AND OF PREFERENCE AMONG LEGATEES.

Gratuitous acts on death-bed are like legacies.

In acts of disposal which take effect immediately, regard is to be had to the state of the disposing party at the time of the contract. If he was then in health, they are valid as against the whole of his property; and if he was not then in health, they are valid as against a third of it. By acts of disposal are to be understood such acts as are initiatory or creative of right, and have in them something gratuitous. For the acknowledgment of a debt in sickness operates against the whole of a person's estate; and a marriage contracted in sickness is in like manner operative against the whole, to the extent of the proper dower. An act of disposal which is not to take effect till after the death of the disposing party, as when he has said, 'Thou art free after my death,' or, 'This is to Zeid after my death,' is good only to the extent of a third of his property, even though it were made in health. Emancipation, *muhabát*, *wukf*, gift, and *zumán* or suretyship, by a sick man, have all the same effect as bequests, and operate only against a third of his property.[1]

And void when made in favour of one who subsequently becomes an heir.

When a sick man has acknowledged a debt to a woman, or bequeathed a legacy to her, or made her a gift, and has subsequently married her, and then died, the acknowledgment is lawful according to 'us,' but the legacy and the gift are void. And when a sick man has made a bequest to his son who is an infidel or a slave, or has made

[1] *Doorr ool Mookhtar*, p. 827.

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person, the legacies rank equally against the third; for this is not an emancipation that is to be begun with, or is entitled to preference. But if the testator had said, 'He is free after my death,' or 'If anything happens to me in this sickness then he is free,' a beginning must be made with the emancipation before the legacy. So also, every emancipation to take effect after death without any interval of time, is entitled to preference over other legacies.

Among legacies for pious purposes, some are preferred to others.

When the legacies have been added up, and the third of the estate is sufficient to meet them all, they are all to be paid out of it, whether they be bequests to Almighty God, or to mankind. By bequests to Almighty God are to be understood 'bequests of approach,' or which are the means of drawing nigh to him, such as the prescribed *hujj*, or pilgrimage to Mecca; the *zukat*, or poor's-rate, fasting, prayers, expiations, the erection of *musjids*, and the like. And by bequests to mankind are to be understood such as bequests 'to Zeid, Bukr, and Khalid.' All the legacies are to be paid in like manner when, though the third of the estate is insufficient to meet them, they are allowed by the heirs. If the third of the estate be insufficient to meet all the legacies, and they are not allowed by the heirs, then it is to be considered whether they all be to Almighty God, or all to mankind; or some be of one class and some of the other. If they are all to Almighty God, then it is further to be considered either whether they are all *furaiz*, that is, actually prescribed or appointed duties; or *wajibat*, that is, things which, though not actually prescribed, are yet, in themselves, necessary and proper; or *nuwafil*, which are voluntarily assumed obligations; or whether they are partly of one kind and partly of another. When they are all equally prescribed or appointed duties, a beginning is to be made with that which the testator began with. When the bequest is for *hujj* and *zukat*, a commencement is to be made with the former, though it were verbally last. It has been said, with regard to *hujj* and *zukat*, that they both take precedence of expiations, and expiations take precedence of the *sudukat i fitr* (or alms of the *fitr*), and these of sacrifices, though sacrifices are also *wajib*, or

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necessary, according to 'us.' With regard to the alms in question, all are agreed that they are *wajibat*; but whether sacrifices be so is a point that is still within the province of *ijtihad*, or juridical discussion, and what all are agreed about is still stronger. Thus, also, the alms of the *fitr* are preferred to expiation of the *fitr*, in the month of Ramzan. And it has been said that the former have also precedence of vows, and vows of sacrifices, and these of *nuwafil*, or voluntary obligations. In all this that has been said, it is assumed that there are no legacies of emancipation, to take effect at once during death-sickness, and no emancipation dependent on death, which is *tudbeer*. If there be any such, they have preference, for these emancipations do not admit of being revoked, and are, therefore, stronger, and entitled to preference. A bequest of emancipation, if it be *wajib*, or necessary, as an expiation, is like other expiations of which we have spoken already; but if they are not *wajib*, their effect is like that of spontaneous bequests to the poor, the building of *musjids*, voluntary pilgrimage, and the like.

Among legacies to persons, there is no preference.

When the legacies are partly to Almighty God, and partly to mankind, as, for instance, to a class of persons, the portion of the latter is to be taken out of the third, and to be divided among them without preference of any over the others; and with regard to the portion of Almighty God, it is to be applied, first to *furaiz*, next to *wajibat*, and then to *nuwafil*. And if, with the legacies to Almighty God, there is a legacy to one person in particular, each of the kinds of approach is to be treated as single. Thus, if one were to say, 'A third of my property in *hujj*, *zukat*, expiations, and to Zeid,' the third would be divided into four portions—one for Zeid, one for *hujj*, one for *zukat*, and one for expiations.

When all the legacies are to mankind preference is to be given to the strongest; so that if there be among them an emancipation to take effect immediately, it is to have the precedence; but if all are equal in strength, each is to rank for its amount against the third of the property, without any regard to the order in which they may have been mentioned by the deceased.

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CHAPTER V.

OF LEGACIES TO AKARIB,[1] OR NEAR RELATIVES, AND OTHER CLASSES OF PERSONS.

Akarib, or near relatives.

In the case of a bequest to *akarib*, four conditions are required by Aboo Huneefa to give a right to it. First, the parties must be two or more. Second, regard is to be had to the nearest, so that the nearer excludes the more remote, as in cases of inheritance. Third, the claimant must be within the prohibited degrees to the testator, so that the son of a paternal uncle is not entitled to participate in such a bequest. Fourth, the claimant must not be an heir of the testator. Subject to these conditions, infidels and *Mooslims*, males and females, free and slaves, children and adults, are all equal. According to the other two, every one of kin to the testator has an interest in the legacy, whether the relation be on the father's or the mother's side, up to his most remote ancestor in *Islam*; and there is no difference between the nearer and the more remote, one and many, infidel and *Mooslim*. All are agreed that an heir has no right to the legacy. According to Aboo Huneefa, if there be one relative, he is entitled to half the legacy. If the testator have left two paternal and two maternal uncles, none of whom are heirs; as, for instance, when he has left them and a son,—the legacy is to the paternal, and not the maternal uncles, according to Aboo Huneefa; while, according to the other two, it is to be divided among them in four equal parts. If he have

[1] Pl. of *ukrub*, 'nearer,' or 'nearest;' comparative of *kureeb*, 'near;' derivative adjective from *kurabut*.

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left one paternal uncle and two maternal uncles, the paternal uncle has a half of the third (that is, the legacy), and the maternal uncles have the other half between them;[1] while, according to the other two, it is to be divided among them in thirds. And if there were only one paternal uncle and no other relative within the prohibited degrees, half the third would be to the paternal uncle, while the other half of it would revert to the heirs of the testator, according to Aboo Huneefa; while, according to the disciples, the other half of the third would pass to a relative not within the prohibited degrees. When the testator has left a paternal uncle and aunt, and a maternal uncle and aunt, the legacy is to the paternal uncle and aunt equally, by reason of their being equally near to the deceased.[2]

Zee kurabut, or a person of one's kindred.

When one has made a bequest to a person of his kindred (*zee kurabutihi*), or to a person of his relatives (*zee ruhmihi*), one is entitled to the whole; so that if he were to leave a paternal and a maternal uncle, the whole of the third would be to the paternal uncle, according to Aboo Huneefa.

Kurabut, or kindred generally.

In the case of a legacy to kindred generally (*kurabut*), when they cannot be numbered, 'our' sheikhs have differed as to its legality, some saying that it is void; but Moohummud Ben Sulmah has declared it to be lawful, and the *futwa* is to that effect.[3]

Ahl-i-beit or people of the house.

When one has made a bequest to the people of his house (*ahl-i-beit*), all are included who are connected with him

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[1] It would appear from what follows that this was the opinion of Aboo Huneefa, and that consequently he did not exclude maternal relatives altogether, but merely gave a preference to the paternal when more than one.

[2] The authority cited is the *Hidayah*, in which it is stated that the aunt though not an heir is included, because paternal kinship is stronger than maternal. Vol. iv., p. 1469, and see *Inayah*, vol. iv., p. 592.

[3] *A fortiori*, if they can be numbered. For the meaning of *kurabut*, about which it does not appear that there was any difference between the master and his disciples, see *ante*, p. 586; and for the meaning of 'cannot be numbered,' see a little farther on.

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by his fathers, to the most remote of them in *Islam* whether the individual be male or female, provided that the connection with the testator be on the side of his fathers; and no one who is related to him only on the side of the mother participates in the benefit of it.

Nusub, husub.

In like manner, when one has made a bequest to his *nusub* or *husub*, it is for the benefit of his kindred who are related to him through his fathers, up to the most remote of them in *Islam*. So, also, when the bequest is to the *jins* or *luhmah* of such an one, it is to the children of his fathers; and a bequest to the *al* of such an one comes into the place of a bequest to the people of his *beit*, none of the kindred of the mother having any interest in it. If a woman should make a bequest to her *jins* or the people of her *beit*, her own child would have no interest in it; for he is of the *nusub* of his father and not of his mother, except when her husband was of her *asheerah*, or paternal relatives.

Jins, luhmah Al.

Ahl.

When a person has bequeathed a third of his property to his *ahl*, or to the *ahl* of such an one, though, by analogy, a wife and none other should have any interest in the legacy, yet it is applied, on a favourable consideration, to all who are living in his family, and are maintained by him, with the exception of his slaves; and though his *ahl* are in two cities, or in two houses, they are all included, on account of the generality of the word employed.

Full and half brothers.

When a man has made a bequest to his three brothers, of different kinds, and has left a son, the legacy is lawful, and belongs to them equally, because none of them inherits with a son. But if there were a daughter, the legacy would be lawful only with regard to the half-brother on the father's side and the half-brother on the mother's side, but not to the full brother, because he participates in the inheritance with the daughter; while, if the testator has left neither son nor daughter, the whole of the legacy belongs to the half-brother on the father's side, for he is not an heir, and is void as to the full brother and the

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half-brother by the mother, because both of them inherit from the testator.

Hushum. If a man should make a bequest to his *hushum*, all who are in family with him, or are maintained by him, are entitled to participate: to the exclusion, however, of his child, parent, wife, and slave; but all of his *kurabut*, or kindred, are included.

Kowm, âtrut. If one should make a bequest to his *kowm* (tribe) or *âtrut*, it is not lawful,[1] unless he say, 'to the poor of them.' A bequest to one's *kooduma*[2] is to all those who have associated with him for thirty years.

Bunnee. If one should bequeath a third of his property to the *bunnee* of such an one, and the person referred to was the father or ancestor of a *kubeelah*, or large collection of persons, like Tumeem to the Bunnee Tumeem, and there are *awlad*, or descendants, both male and female, the third is to be divided among them all equally, when they can be numbered, according to all opinions;[3] and the division is to be in like manner when they are all males. When they are all females, no particular mention has been made of the case in the Book;[4] but it has been said that they ought also to have the third. When, on the other hand, the person referred to is merely a father (not the ancestor, of a race), and he has *awlad* who are all females, they have no right whatever to the legacy,[5] though if they are all males, they are entitled to it. If they are both males and females, there was a difference of opinion, Aboo Huneefa and Aboo Yoosuf insisting that the males only and not the females are entitled. If the person referred to have no children of his loins, but children of

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[1] Perhaps on account of the number.

[2] Pl. of *kudeem*, 'former,' or 'ancient.'

[3] If they cannot be numbered, it would seem that the legacy is void. See *post*, p. 662, as to descendants of Aly.

[4] According to the *Kashf-az-zunún*, as cited by Mr. Morley (*Digest of Reported Cases*, Introduction, p. 265), the *Mookhtusur* of Koodooree is generally meant by this expression.

[5] Because the word *bunnee* means, properly, 'sons,' being an irregular pl. of *ibn*.

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his children, are these included in the legacy? If they are children of daughters, they are not included when the bequest is to the *bunnee* of such an one; but when it is to the child of such an one, and he has daughters and none else, they are included in the legacy. If he have both sons and daughters, it is to them equally, according to our three masters, without any superiority of males over females. When the bequest is to the *awlad* of such an one, and there are no children of his loins, those of his sons have the benefit of the legacy; but as to the rights of daughters' children, there are different reports.[1]

Heirs.

When there is a bequest to the heirs (*wurusut*, pl. of *waris*) of such an one, it is to them in the proportion of a double share to males over females. When one has made a bequest 'to the daughters of such an one,' and he has sons and daughters, the legacy is to the latter exclusively; and if he have sons and the daughters of sons, it is to these daughters only; but if there are only daughters' daughters, they are not included in the legacy, unless there is anything to indicate that the testator intended it for them, when they would be included. When a bequest is 'to the fathers of such an one and the fathers of such an one,' and the persons indicated have fathers and mothers, they are all included in the legacy; but if there are no fathers nor mothers, and only grandfathers and grandmothers, these have no interest in the legacy.

Effect of a mistake in the number of legatees;

If one should say, 'I have bequeathed a third of my property to the *bunnee* of such an one, and they are five,' when there are only three or two, these take the whole legacy. But if he should say, 'to the two sons of such an one,' when there is only one, he has but a half of the legacy. While if he name them, saying, 'to the two sons of such an one, Zeid and Amr,' when there is only one son, he takes the whole. If the words are, 'to the *bunnee* of such an one, and they are three, a third of my property,' when there are five, the legacy is to three of them, and the choice is with the heirs; and if another

[1] See *ante*, p. 580.

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be joined with them in the bequest, he has a fourth of the third. If he should say, 'I have bequeathed a third of my property to the *bunnee* of such an one, and they are five, and to such an one a third of my property,' when there are only three sons of the first, the other is their partner for a fourth. If one should say, 'I have bequeathed the whole of my *ghunum*, or flock, and it is a hundred sheep,' when it exceeds that number, but still comes within a third of the property, the legacy is lawful for the whole, But if he should say, 'I have bequeathed my *ghunum*, and it is this,' when he has, in fact, another that comes within the third also, though there is some analogy between this and the preceding case, the author of the Bidaya says, 'I would reject analogy and give the legatee the *ghunum* mentioned; and if the testator had said, 'I have bequeathed to such an one my *rukeek* (slave), and he is three,' when there are, in fact, five slaves, I would give the legatee the whole five, if they came within a third of the property.'

Or of things bequeathed.

Legacy to neighbours.

When a person bequeaths a third of his property to his neighbours, some say that if they can be numbered, the third is to be divided among them all, rich and poor. And it is to be divided in like manner if he should say, 'to the people of the *musjid*.' The definition, or meaning, of 'cannot be numbered,' according to Aboo Yoosuf, is when the persons cannot be computed without the aid of a written account; but, according to Moohummud, it is when they are more than a hundred. Others, however, have said that the matter should be left to the discretion of the judge, and the *futwa* is to that effect; though Moohummud's rule is easier. If the neighbours cannot be numbered the legacy is void; and so, also, when the legacy is to the people of the *musjid*, or of the *sijn*, or prison, and they cannot be numbered. Moohummud has said that when a bequest is made to the orphans of the *bunnee* of such an one, and they can be numbered, the legacy is to be expended on all in the same way as if it were on 'the orphans of this street,' or 'of this mansion,' rich and poor participating alike; but if they cannot be

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numbered, the legacy is to be expended on the poor among them.

If one should make a bequest to the *aramil* of the *bunnee* of such an one, it is lawful, whether they can be numbered or not, and is to be expended on as many of them as possible, down to two, according to Moohummud, or even one, according to the other two. A bequest to the husbands of one's daughters includes the husband of every daughter that is a wife at the time of the testator's death, or a *mooutuddah* for a revocable divorce, but not one who has been divorced absolutely. A bequest to the blind, or the infirm, or debtors, travellers, prisoners, warriors, or *aramil*, if they can be numbered, is for the rich and poor of them, and if they cannot be numbered, for their poor. *Aramil.*

An *urmulut* (singular of *aramil*) is an adult female who has had connection, but has no husband. *Shab* and *futa* are persons between fifteen and thirty or forty years of age, unless whiteness (of the hair) predominates sooner. *Kuhl* is a person from thirty or forty years of age to sixty, unless whiteness predominates sooner; *sheikh* is a person above fifty; and *ghoolam*, a youth under fifteen years of age, unless he arrives sooner at puberty. *Akub* is one that succeeds his father after his death; and so also as to *wurusut*.[1] *Urmulut.* *Shab.* *Kuhl.* *Sheikh.* *Ghoolam.* *Akub.*

When a man has made a bequest to his *as,hár*, it is for everyone within the prohibited degrees to his wife, or to his father's wife, and the wife of everyone within the prohibited degrees to himself, for all these come within the meaning of the term; and everyone is comprehended who is *suhur* (singular of *as,hár*) to the testator at the time of his death, by being so connected with a woman who is then actually his wife, or in her *iddut*, for a revocable divorce; but if the *iddut* be for one that is absolute, or for three repudiations, the person connected with her has no right. *As,hár.*

[1] That is in respect of succession; but the word means heirs generally. See *ante*, p. 659.

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Akhtán. When a man has made a bequest to his *akhtán* (plural of *khutun*), it belongs to the husbands of his female relatives within the prohibited degrees, such as the husbands of his daughter, sisters, paternal and maternal aunts; for all come within the meaning of the term.

Awlad of the Prophet. The lawyer Aboo Jaafur, being asked as to a bequest to the *awlad* of the Prophet, is reported to have answered, that it was for the *awlad* of Husn and Hoossein, and none other.[1] And when one made a bequest to *Alyites* (descendants of Aly), the same Aboo Jaafur is reported to have said that it was not lawful, because they cannot be numbered, and there is nothing in the term that has reference to the poor or necessitous. But a bequest to

Students. the poor of them would be lawful. According to this, a legacy to lawyers, or to students of learning, would not be lawful, but to their poor would be so; and, by analogy, a legacy to the students of a particular place or particular kind of knowledge, would also be lawful.

Ahl-ool-ilm, or men of learning. A bequest to the *ahl-ool-ilm*, or learned of such a city, includes lawyers and traditionists, but not those who discourse with wisdom; but do rhetoricians (*mootukulliman*) participate? There is no express *dictum* in the books on this subject; but it has been said by Aboo Kasim, that books on rhetoric are not accounted books of knowledge; and, therefore, by analogy, rhetoricians should not be included. It is reported, as from Moohummud, that when a man has made a bequest to 'such an one and to the Bunnee Tumeem,' the whole belongs to such an one, and there is nothing for the Bunnee Tumeem; for it is as if he had said 'to such an one and the dead,' since they cannot be numbered; and the legacy to them is void. If the legacy were, 'A third of my property to such an one, and to a man of the Mussulmans,' such an one would have a half of it and nothing more. In like manner, if he were to say, 'A third of my property to such an one and to ten Mussulmans,' such an one would have one part out of eleven, and there would be nothing for Mussulmans.

[1] Though being the sons of his daughter, they would not, in the ordinary case, fall within the meaning of *awlad*.

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CHAPTER VI.

OF USUFRUCTUARY WILLS.

Usufructuary bequests lawful.

It should be known that a bequest of the service of a slave, or the occupation of a mansion, or the produce (*ghullut*) of both, or of lands and gardens, is lawful. And it is lawful for a time or in perpetuity;[1] for, as the profits of a thing may be transferred by a person during his lifetime, with or without a consideration, so they may, in like manner, be transferred after his death; the thing itself being, in a manner, detained in his ownership, that the legatee may enjoy its profits, in the same way as a person in whose favour a *wukf*, or appropriation, has been made, enjoys its profits, by virtue of the ownership of the appropriator.[2] This being so, we may say that when the service of a slave has been bequeathed for a limited time, as, for instance, for a year, the bequest may either be for a particular year, as when one says, 'I have bequeathed for the year 460 (A.H.),' or without any specification of a particular year, as when he does not say, 'for such a year,' and in each case the slave may or may not fall within a third of the property. When the bequest is for a particular year, which is past at the time of the testator's death, it is void. If a part only of the year has expired, or if it has not commenced, at the time of the testator's death, and the slave comes within the third of his property, or the heirs allow the legacy, the slave is to be delivered

Service of a slave; how to be enjoyed by legatee.

[1] Arab. *Abuda*. Mr. Hamilton, in translating the passage, has rendered this word 'an indefinite period;' but when taken adverbially, as it is in the printed edition, it means 'always' (*semper*, Freytag).

[2] *Hidayah*, vol. iv., p. 1474. Trans., vol. iv., p. 527.

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to the legatee, to serve him during the remainder, or the whole, of the specified year, as the case may be. And if the slave does not come within a third of the property, he is to serve the legatee for one day, and the heirs for two days, alternately, until the completion of the year; and when it has been completed, he is finally to be delivered up to the heirs. If no year in particular be specified, and the slave falls within a third of the property, or the legacy is allowed by the heirs, he is to be delivered up to the legatee, to serve him for a whole year, and then to be restored to the heirs. If he does not come within a third of the property, and the legacy is not allowed by the heirs, the slave is to serve the legatee for one day, and the heirs for two days, alternately, for three years; and when the three years have passed, the bequest is fulfilled by the service. If the legatee should die,[1] the slave reverts to the heirs of the testator; and if he die in the testator's lifetime, the bequest is void.[1]

At the legatee's death, the slave reverts to testator's heirs.

What is said of service is equally applicable to produce and occupancy.

Everything that has been said as to the service of a slave for a year, is equally applicable to the produce[2] of a slave for a year, and to the occupancy of a mansion for a year, whether the year be particularized or not.[3]

The service of a slave may be bequeathed to one, and his person to another.

When the service of a slave is bequeathed to one legatee, and his person to another, and the slave is within a third, each legatee is entitled to what has been bequeathed to him respectively. And if the bequest be absolute, the legatee of the service is entitled to it till his death; after which it is to be transferred to the legatee of the person, if he be alive, and if not, then it is to be transferred to the heirs of the testator.

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[1] This last sentence is from the *Hidayah*, vol. iv., p. 1476. In the English translation (vol. iv., p. 528), the words before the expiration of the limited term of usufruct are inserted after 'die;' but there is nothing corresponding to them in the printed original; and I don't think that the author meant to restrict this effect of the legatee's death to bequests for a limited term.

[2] Produce, in the case of a slave, is what may be obtained by hiring him out.—*Doorr ool Mookhtar*, p. 832.

[3] This may be too general as regards the slave. See next page.

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When one has bequeathed the produce of his mansion or slave, and the legatee wishes to occupy the mansion himself, or make use of the service of the slave, can he lawfully do so? There is nothing on the subject in the Asul; and 'our' sheikhs differ, but Aboobekr has said that he cannot; and this is valid. If the bequest be of the occupancy of a mansion, and there is no property besides, the legatee may occupy a third of the mansion, and the heirs have no right to sell the two-thirds of the mansion in their possession. Neither has a legatee of occupancy a right to let the mansion or slave to hire, according to 'us,' nor to remove the slave from Koofa, for instance, unless the legatee and his people are in another place, when the slave may be taken there for the purpose of serving them.

A legatee of the produce of a mansion or slave cannot take the occupancy or service to himself.

A legatee of occupancy or service cannot let to hire.

It is stated in the Moontuka, on the authority of Aboo Yoosuf, according to one report, that when the occupancy of a house is bequeathed to a person without any limit of time, he is entitled to it as long as he lives; and on the authority of Aboo Huneefa, that when one has bequeathed the produce of a particular slave to such an one, without specifying a time, and the slave is within a third of the testator's property, the legatee is entitled to what he may earn for the period of his own life, though the earnings should exceed a third of the property. And in like manner as to a bequest of the produce of the testator's garden, or the occupancy of his mansion, or the service of his slave; and this was the saying of Aboo Yoosuf and Moohummud. In the Nuwadir it is reported as from Aboo Yoosuf that when a man has made a bequest that a slave is to serve such an one until he can do without him, if the legatee is a child, the service is to continue till he is of age; if he is adult and poor, the service is to continue until he is able to buy a slave to serve him: and that if he is adult and rich, the legacy is void.

When no time is limited, the bequest is for the life of the legatee.

When one has bequeathed the produce of his garden, the legatee is entitled to the existing and the future produce. But when the bequest is of the fruit of his garden, it may be in two ways. He may either have said, 'for ever,' or he may not have so said, and in this last case

A bequest of produce includes existing and future produce.

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But a bequest of fruit includes only existing fruit, if there is any;

there may or may not be fruit in existence at the time of his death. When there is fruit in the garden on the day of the testator's death, the legatee is entitled to it out of the third of his estate, but he is not entitled to the fruit that may be thereafter up to the time of his own death. When again there is no fruit in the garden on the day of the testator's death, the bequest ought by analogy to be void, but on a favourable construction it is not void, and takes effect on any fruit that there may be subsequent to the death of the testator and up to that of the legatee. All this when it has not been expressly said that the legacy is for ever; but when the testator has said, 'I have bequeathed to thee the fruit of my garden for ever,' the legatee is entitled to the existing fruit and to all that there may be thereafter.

unless the bequest is '*for ever.*'

And a bequest of the wool, &c., of flocks, does not include the future wool, &c., though the bequest is 'for ever.'

When a man has bequeathed to another the wool of his flocks, or their progeny or milk for ever, and has then died, the legatee is entitled only to the wool that may be on their backs, or the young that may be in their bellies, or the milk that may be in their udders,—whether he say 'for ever' or not.[1]

When the bequest is a part of the produce of a garden, a partition may be made of the substance.

When a person has bequeathed a third of the produce of his garden for ever, without leaving any other property, the bequest is lawful, and if the legatee of the third should make a partition with the heirs, and his third is productive while the portion of the heirs is not productive, or *vice versâ*, he or they, as the case may be, is entitled to share in the produce of the productive portion, and the heirs may sell their two thirds of the garden, whereupon the purchaser will become a partner with the legatee of the

[1] It will be observed that there are three cases:—One where the subject of the bequest is the produce of a garden or land, or the occupancy of a mansion, or the service of a slave, and *there* the existing and future produce are included, so long as the legatee lives, whether 'for ever' is mentioned or not; another, where the subject of the bequest is fruit, and there is some fruit in existence, and *there* the future fruit is not included, unless 'for ever' is mentioned; and the third where the subject of the bequest is the wool, &c., of an animal, and *there* the future wool is not included, though 'for ever' is mentioned.—*Kifayah*, vol. iv., p. 1480.

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third. But if the legacy be of the third of the produce of a mansion, Aboo Huneefa has said that though the bequest is lawful, the heirs cannot make a partition, lest the legatee should get no produce; but according to Aboo Yoosuf they may make a partition, giving him his third, and if the third is productive, he has its produce, while if it is not productive, he has nothing; and the heirs may also sell him two thirds, whether before or after the partition.

When it is of the produce of land, the land may be let.

When a man has bequeathed the produce of his land, and there are neither palm nor other trees in it, and no other property besides, the land is to be let, and a third of the rent given to the legatee. If there be palm or other trees on the land, a third of the produce is to be given to him, and the land is not to be given out in *moozaraut*, on a half or third of the profits, though *moozaraut* is, in truth, a lease when the seed is furnished by the labourer.

A bequest of produce is cancelled by the legatee's purchasing the substance.

When a man has bequeathed to another the produce of his garden, the legatee may purchase the garden from the heirs of the testator, but that cancels the legacy. In like manner, if they satisfy him with something else, he may surrender his third of the produce, and release them from it. So, also, the occupancy of a house, or the service of a slave, may be lawfully compounded for, though a sale of these rights is not lawful.

A bequest of produce to unknown persons is lawful, but not so of occupancy or service.

A bequest of the produce of a mansion or a slave to the poor generally, is lawful; but a bequest of the occupancy of a mansion, or of the service of a slave, to the poor, is not lawful, unless the persons are known.

The bequest of a *zurf* or vessel to one, and its contents to another, is lawful, if connectedly expressed.

When a person has said, 'I have bequeathed this slave to such an one, and her burden to such another;' or, 'this ring to such an one, and its stone to such another;' or, 'this bag to such an one, and the dates which are in in it to such another'—connecting the legacies together—each legatee is entitled to what has been bequeathed to him, and the legatee of the vessel (*zurf*) has no right to anything that is contained in it.[1] But when one of the

[1] That is, the legatee of the slave has no right to the child, nor the legatee of the ring to the stone, or the legatee of the bag to its

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Difference of opinion where the bequests are separate.

declarations is separated from the other, though the effect is the same, according to Aboo Yoosuf, yet, according to Moohummud, the legatee of the principal is exclusively entitled to the principal, and the two legatees are partners in the accessory. The argument of Aboo Yoosuf is, that the testator, by his declaration in the second sentence, explains that his intention by the first was to give the slave without her burden (and so in the other cases), and whether the explanation is given separately or connectedly makes no difference. And the argument of Moohummud is that the word ring comprehends both the hoop and the stone; the word handmaid comprehends both the woman and what is in her belly, and so, in like manner, as to the word bag. So that, when the declarations are separated there are, in fact, two legacies of the stone, &c., and the second legacy is not a revocation of the first, any more than a second legacy of the whole ring would be a revocation of the first;[1] the stone is accordingly made the property of both in equal shares. The case would be different if the whole were in one sentence; for that would be equivalent to an explanation that the legatee of the ring was to have the hoop only, or with the exception of the stone. It is also different from a bequest of the slave to one person, and his service to another.[2]

Bequests of a principal and accessory to different persons are lawful, whether expressed connectedly or separately.

Otherwise where the accessory is placed before the principal.

If a person should bequeath 'this slave to such an one, and his service to such another,' or 'this mansion to such an one, and its occupancy to such another,' or 'this tree to such an one, and its fruit to another,' or 'this sheep to such an one, and its wool to another,' each legatee would have what was mentioned for him, without any difference of opinion, whether the bequests are connected together or are separate. But if a beginning is made in these cases with the accessory, and the principal is then bequeathed, as for instance, if the service of the slave is first bequeathed

contents.—*Kifayah*, vol. iv., p. 1474. Mr. Hamilton has, I think, mistaken the passage, *Hedaya*, vol. iv., pp. 531-2.

[1] See *ante*, p. 630.

[2] *Kafee*, *Hidayah*, vol. iv., p. 1479. The reasons for the different opinions are from the latter authority.

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to one person, and then the slave to another, or the occupancy of this mansion to one person, and the mansion itself to another, or the fruit to one and the tree to another, it is only when the bequests are made connectedly that each legatee is entitled to what has been named for him specially; for if they are mentioned separately, the legatee of the principal is exclusively entitled to the principal, and the accessory belongs to them both in halves. And if a mansion is bequeathed to one person, and a particular apartment in it to another, the apartment is to both in shares. So, also, if a thousand *dirhems* are bequeathed to one person, and a hundred out of them to another, the legatee of the thousand is entitled to nine hundred exclusively, and the hundred is to be equally divided between them; and in this there is no difference of opinion.

The legatee of the person is bound to maintain a young slave till he is able to work; but after that, the legatee of the service is liable.

When the service of a young slave has been bequeathed to one person, and the slave himself to another, the latter is bound to maintain him until he is fit for service; but after that, the former is liable for his maintenance. So, also, when the produce of palm-trees has been bequeathed to one person for ever, and the trees themselves being yet immature to another, the latter is liable for the expense of watering and tending them until they arrive at maturity and are in bearing, after which the liability is on the former; and when they have begun generally to bear, though they should then fall off and produce nothing, the legatee of the produce would still be liable for the expense, in the same way as a legatee of service is liable for maintenance both night and day, though the slave sleeps and does no work during the night. When a slave who has been bequeathed to one person and his service to another falls sick, and becomes unfit for service by infirmity or any other cause, the legatee of his person becomes liable for his maintenance.

Bequest of an annuity.

If twenty *dirhems* a year are bequeathed to a person from the produce of a garden which sometimes produces much and sometimes little, he is entitled to have a third of the produce appropriated or laid aside every year, and

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twenty *dirhems* out of it applied to his maintenance so long as he lives. And in like manner, if the bequest be of five *dirhems* a month for his maintenance out of the testator's property, a full third of the property must be appropriated or put aside, that the legatee may obtain his maintenance of five *dirhems* a month, as directed by the testator. And it makes no difference whether the bequest be of one or of ten *dirhems* a month.

Bequest of a third to one, and annuities to two others.

If a testator should bequeath a third of his property to one person, five *dirhems* a month for maintenance to another so long as he lives, and five *dirhems* a month for maintenance to a third person so long as he lives, and the heirs allow all the legacies, the estate is to be divided, according to Aboo Huneefa, into nine parts, one of which is to be given to the legatee of the third, and the remaining eight to be appropriated for the other legatees, four parts for each; but, according to Aboo Yoosuf and Moohummud, the property is to be divided into seven parts, whereof one is to be given up to the legatee of the third, and the remaining six to be appropriated for the other legatees, three for each.[1] So far when the heirs allow all the legacies. But now suppose that they do not allow them: and here the division is still to be into seven parts, according to Aboo Yoosuf and Moohummud; but according to Aboo Huneefa, the case is to be treated as if all the legatees were equally entitled to the third, which is consequently to be divided into three parts among them. In these circumstances, if both the annuitants should die before the fund is exhausted, the surplus is to revert to the legatee of the third; and if only one of them should die, the surplus is to be divided, and one given to the legatee of the third, and the other reserved for the survivor, according to Aboo Huneefa; while, according to the other two, only a fourth is to be given to the legatee

[1] That is, the property being treated as unproductive, one part out of nine according to Aboo Huneefa, and one part out of seven according to the disciples, is all that can be immediately handed over to the legatee of a third, the rest being reserved to meet the annuities.

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of the third, and three-fourths to be reserved for the survivor.

Bequest of an annuity to one, and another annuity to two others, out of the property generally.

If the testator should bequeath five *dirhems* a month for maintenance to such an one so long as he shall live, and ten *dirhems* a month for maintenance to such an one and such an one so long as they shall live (whether he say, 'to each of them five,' or does not say so), and the heirs allow the legacies, the property is to be divided into halves, one-half to be reserved for the legatee of five, and the other half for the two legatees of ten; for the legatee of five is to be considered as a legatee of the whole, and the two legatees of ten are to be considered together as one legatee of the whole, so that the property is to be divided between them in halves, according to all opinions; and if the single legatee should die, what remains is to be reserved for the legatees of the ten, and ten *dirhems* a month applied to their maintenance; and if one of the two whom the testator had put together should die (the legatee of five being still alive), what remains of his share is to be reserved for his fellow, and five *dirhems* to be applied to his maintenance every month. If the heirs do not allow the legacies, a third of the property is to be divided into halves,—one-half of the third for the single legatee, and the other half for the two legatees whom the testator has put together,—according to all opinions.

When the annuities are to come out of the third.

If one should bequeath out of the third of his property a maintenance of four *dirhems* a month to such an one so long as he shall live, and a maintenance of ten *dirhems* a month to such another and such another so long as they shall live, and the heirs allow the legacies, one third of the property is to be appropriated for the legatee of four *dirhems*, and another third on the two legatees of ten *dirhems*; and if the legatee of the four should die before his third is exhausted, what remains of it is to revert to the heirs of the testator; and if one of the other two should die, what remains of his share is to be reserved for his fellow; and when the other dies, if anything should remain, it is to revert to the heirs. If they do not allow the legacies, the third is to be divided into halves, and

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one-half of it is to be reserved for the legatee of four *dirhems*, and the other half for the two legatees of ten *dirhems*.

When the third is bequeathed to the annuitants for their maintenance.

Moohummud has said, in the Jama, that when a man says, 'I bequeath my third to such an one, to be appropriated that he may have four *dirhems* out of it for maintenance, every month, so long as he lives; and I bequeath my third to such an one and such an one, that they two may have ten *dirhems* laid out for maintenance every month, so long as they live,' and the heirs allow the legacies, a full third of the property is to be delivered up to the legatee of four, to do with it as he pleases, and the other two thirds to be delivered to the two legatees of ten, between them, and that neither much nor little is to be appropriated, and that when any of them dies, his portion goes to his heirs. But if the heirs do not allow the legacies, the legatee of a fourth is to have a half of the third, and the legatees of the ten to have the other half. And, in like manner, if he should say, 'I bequeath my third to such an one that he may have four *dirhems* a month out of it for maintenance, and I make a bequest to such an one and such an one, that such an one may have five *dirhems* a month out of it for maintenance, and such an one three *dirhems* a month for maintenance,' and the heirs allow the legacies, the legatee of the four is to take a third of the whole property, and the other two legatees to take another third between them in halves, to do with as they like; while if the heirs disallow the legacies, the legatee of the first is to have half of the third, and the other two to have the other half of it between them, and the share of whoever of them may die goes to his own heirs.

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CHAPTER VII.

OF THE WILLS OF 'ZIMMEES,' OR INFIDEL SUBJECTS, ALIENS, AND APOSTATES.

Will for secular purposes: for pious purposes.

THE will of a *zimmee* for secular purposes is valid, according to all opinions. Other than secular purposes are of four different kinds. First, there are purposes which are *koorbut*, or a means of approach to Almighty God, both with them and with 'us;' and bequests for such purposes are valid, whether they be to a set of particular persons or not. Second, there are purposes which are sinful, both with them and with 'us;' and bequests for these purposes are valid, if they are to a set of particular persons, and the bequest is a gift without regard to the purposes; but if the persons are not particularized, the bequest is void. Third, there are purposes which are *koorbut* with 'us,' but sinful with them; and a bequest for these purposes is valid if in favour of a set of particular persons, and is a gift without regard to the purposes; while if the persons are not particularized, the bequest is void. Fourth, there are purposes which are sinful with 'us,' but *koorbut* with them; and bequests for these are valid according to Aboo Huneefa, whether the persons be particularized or not, but void according to the other two when the persons are not particularized. Thus, when a *zimmee*, being a Christian or a Jew, has directed, by his will, that slaves be purchased and emancipated on his account, whether with or without a specification of individuals, or that a third of his property be bestowed in charity on beggars and the indigent, or ex-

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pended in lighting the holy shrine, or in making war against Turks, the bequest is valid.[1] And if a *zimmee* should bequeath a third of his property to mourners and singers, the bequest is valid if they are particularized and it is a gift to them; but if they are not particularized, it is void. And if the third is to be expended in sending a set of Mussulmans on pilgrimage, or building a *musjid* for Mussulmans, and the persons are particularized, the bequest is valid, and a gift, so that they may perform the pilgrimage, and erect the buildings or not as they please; but if the persons are not specified, the bequest is void. If he bequeath a third of his property for the erection of a church, or synagogue, or bequeath his mansion to be converted into a church or synagogue, the bequest, according to the two disciples, is void, unless it is for a particular class of persons, when it is a gift to them; but, according to Aboo Huneefa, it is valid under all circumstances. This, however, say 'our sheikhs,' only when the erection is in the villages not in towns, the bequest in the latter case being inoperative.

Will of a *moostamin.*

When an alien who is a *moostamin* makes a bequest to a *Mooslim* or a *zimmee*, it is valid for the whole of his property, unless his heir had come into the *Dar ool Islam*, or Mussulman territory, with him; and in that case, the bequest as to the excess over a third is dependent on the allowance of his heir. But if he has no heir, it is valid as to the whole of his property in the same way as the will of a *Mooslim* or *zimmee* is valid in the like case. So also though he has an heir in the foreign country. If he has bequeathed only a part of his property, the remainder is to be given to his foreign heir. If a *zimmee* bequeaths more than a third of his property or makes a bequest to one of his heirs, it is not valid, as in the case of a similar bequest by a *Mooslim*. But if he bequeath to a person of a different religion it is valid, as in the case of inheritance. If, however, the bequest is to an alien, who is not a *moostamin*, it is not valid.

[1] *Beit-ool-Mookuddus.* See *ante*, p. 634.

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Will of an apostate.

If a *Mooslim* should apostatize to Christianity, Judaism, or Majooseeism, and then make some of the bequests referred to, such of them as would be valid if made by a *Mooslim* remain in suspense until he returns to the faith, or is put to death, or dies naturally, or takes refuge in a foreign country; and such of these as are not valid if made by a *Mooslim* are void according to Aboo Huneefa;[1] but, according to the other two, the acts of an apostate are operative for the present, so that whatever is valid to the sect to which he apostatizes is valid to him; and if the bequest be a *koorbut* with them but sin with 'us,' it is valid in their opinions, though to a set of persons who are not particularized. With regard to a female apostate, her bequests are valid so far as the bequests of the sect to which she has apostatized would be valid, because she is not liable to be put to death for her apostasy.[2]

A church or synagogue, founded in health, descends to the heir of the founder.

When a Jew or a *Mooslim* has built a synagogue or a church, being in health at the time, and then has died, it is the property of his heirs; because it is a *wukf* and not obligatory, according to Aboo Huneefa, and sinful according to the two disciples.[3]

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[1] *Hidayah*, vol. ii., p. 802.

[2] The reason would apply equally to male apostates within the British territories; and, by inference, it would seem that Moohummudan law is no longer applicable to a person who has ceased to be a Mussulman.

[3] *Hidayah* and *Kifayah*, vol. iv., p. 1482.

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CHAPTER VIII.

OF THE EXECUTOR AND HIS POWERS.

Definition.

THE executor is termed *wusee* and the *moosa-ilehi*,[1] and is defined to be an *ameen*, or trustee,[2] appointed by the testator to superintend, protect, and take care of his property and children after his death. He is also his *kaim mookam*, or personal representative.[3]

Not advisable to be an executor.

It is not advisable to accept the office of an executor, for it is a perilous matter, on account of what Aboo Yoosuf is reported to have said :—'To enter upon executorship for the first time is a mistake, for the second a fraud, and for the third a theft.'

Different kinds of executors.

There are three kinds of executors. The first is a trustee who is capable of performing the duty which has been committed to him; and such an one is fixed (*mookurrur*) and cannot be removed by the judge. The second is a trustee who is weak and incapable, and to whom the judge should appoint an assistant. The third is a profligate, an infidel, or a slave, whom it is proper that the judge should remove and appoint another in his stead. The word implies that the appointment is valid in the first instance, for otherwise there could be no removal.[4]

An executor may decline or accept the office before or

When a person appoints an executor, who says in his presence, 'I do not accept,' the refusal is valid, and he is not the executor. When an executor is appointed in his absence, and, on being informed of the appointment

[1] *Inayah*, vol. iv., pp. 607, 610.
[2] *Hidayah*, vol. iv., p. 1496.
[3] More literally. 'one who stands in his place.'
[4] *Hidayah*, vol. iv., p. 1488.

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after the testator's death, says, 'I do not accept,' but subsequently says, 'I accept,' the acceptance is lawful, unless the sovereign had removed him from office before he had said, 'I accept.' But if he had said during the testator's lifetime, 'I do not accept,' and should after his death say, 'I accept,' the acceptance would not be valid. Though if he were merely silent in the presence of the testator, instead of saying 'I do not accept,' and should subsequently, either in his lifetime or after his death, say 'I have accepted,' the acceptance would be lawful, whether made in the presence of the judge or not; unless the judge had, previously to his saying so, removed him from office, when his subsequent acceptance would not be valid. If he should say in the absence of the testator, 'I do not accept,' and should communicate his refusal to him either by letter or messenger, and after this should say, 'I accept,' the acceptance would not be valid,

after the death of the testator.

Moohummud has said in the Jama Sugheer, with respect to a person who had appointed another his executor, and the executor had accepted in his lifetime, that the executorship is binding on the acceptor; so that if he should wish to withdraw from the office after the death of the testator, he is not at liberty to do so. But if he retracts in the lifetime of the testator and before his face, the retractation is valid, but if it is not made before his face, it is not valid. What is meant by saying, 'before his face,' is with his knowledge, and 'not before his face,' is without his knowledge. If an executor should accept in the presence of his testator, and the testator should say when he is absent, 'Take witness that I have discharged him from the executorship,' Husun has reported as from Aboo Huneefa, that the discharge is valid. But if an executor should reject his appointment in the testator's absence (after he has once accepted) the rejection according to 'us' is void.

But if he has once accepted, he cannot retract after the death of the testator, nor in his lifetime without his knowledge.

Yet the testator may cancel the appointment in the executor's absence.

When a person has appointed another his executor without the other's knowledge, and the executor sells some part of the estate after his death, the sale is good, and the executorship binding on the person appointed. A

Sale by an executor of testator's property after his

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death is acceptance.

person having appointed two executors, one of whom accepted and the other remained silent, the acceptor says to the one that was silent, 'Buy a shroud for the deceased,' and he does so, or answers 'Yes;'—this is acceptance of the executorship, even though the silent one be the servant of the other, unless he is a freeman working with him.

When an executor may be relieved of his office by the judge.

Kurukhee has said that when an executor has accepted, or has, after the death of the testator, disposed of any part of his property, and then wishes to relieve himself of his office, he cannot lawfully do so, except in the presence of the *hakim*, or judge. And when he appears before the judge with this view, the judge ought not to relieve him without considering whether he is competent to the proper discharge of its functions, and relieve him only if he believes him to be unfit or overburdened with business.

Appointment of a slave as executor;

When a man has appointed a slave, whether his own or that of another, to be his executor, and all his heirs are adult, or some of them are adult and some minors, the appointment is void. So Moohummud has stated in the Jama Sugheer and in the Asul. But by saying the appointment is void, he meant only that it will be annulled; so that if the slave should do any act of disposal before his appointment is cancelled, as, for instance, by selling any part of the deceased's estate or the like, the act is operative, and the obligations of the contract binding on the heirs. If the heirs are all young, and the slave be the slave of any other than the testator, the appointment is also void; but if the slave be his own, the appointment is lawful, according to Aboo Huneefa, though in this case also Aboo Yoosuf held the appointment to be void, according to the explanation above given of that term. Of Moohummud's opinion, the reports are confused, some saying that he agreed with Aboo Huneefa, and some with Aboo Yoosuf.

of a profligate;

When a profligate has been appointed from whom danger may be apprehended to the property, it is stated in the Asul that the appointment is void; by which they say is to be understood that the judge will expel him from the office. And Husun has reported, as from Aboo Huneefa,

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that it is incumbent on the judge to expel him and appoint another in his stead, when this profligate is such an one as ought not to be an executor. But if the judge has given operation to the appointment, and the executor has then paid debts of the deceased, or sold something, as executors usually do, before the judge expels him from office, his acts are lawful; and if he is not expelled till he repents and becomes good, the judge should allow him to remain in his office. If the judge is not aware that he is executor and appoints another in his presence, who wishes to enter upon his office, he may lawfully do so; but this is not an expulsion of the first executor. And if a judge, not knowing that there is an executor to the deceased, appoints another in the executor's absence, the proper executor is the nominee of the deceased, not the nominee of the judge.

of a *zimmee* not an alien to a *Mooslim*;

When a *Mooslim* has appointed an alien his executor, the appointment is futile (*batil*), whether he be a *moostamin* or not; by which is to be understood that the appointment will be cancelled; for if it be of a *zimmee*, the judge may cancel it, and expel him from the office. When a *zimmee* has appointed an alien his executor, the appointment is not lawful; for a *zimmee* is with respect to an alien in the same position as a *Mooslim* with respect to a *zimmee*; and if the alien is one from whom danger may be apprehended to the property, the judge will expel him and appoint another in his stead.[1] The appointment by a *zimmee* of a *zimmee* as his executor is lawful; and in like manner that of a *Mooslim* by an alien who has come

[1] It would seem from this, that if there is no danger to the property, the judge may allow the executor to retain his office; and if so in the case of an alien executor to a *zimmee*, so also in the case of a *zimmee* executor to a *Mooslim*. But Mr. Hamilton has said in the translation of the *Hidayah* (vol. iv., p. 541), that though 'a person may appoint a slave, a reprobate, or an infidel, to be his executor, it is incumbent on the judge to annul such appointment.' There is no word to correspond to 'incumbent' in the printed original, which is rather vague, and the commentator on the passage (*Inayah*, vol. iv., p. 606) merely says that it is lawful to the judge to expel the executor.—See *S. D. A. Cal. Rep.*, vol. iv., pp. 49 and 301.

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into the *Dar ool Islam* under protection is lawful; and in neither case is the executor to be removed. And if a *Mooslim* should appoint an alien his executor, and the alien be converted to the faith, he remains in his state of executor. So, also, when the appointment is of an apostate who returns to the faith.

of a minor or insane person;

The appointment of a minor or of an insane person, whether permanently so or with lucid intervals, is unlawful. But a woman, a blind person, or one who has undergone the *hudd*, or specific punishment for slander, may lawfully be appointed an executor. When a minor has been appointed an executor, the judge should remove him and appoint another in his stead. So Khusaf has ordained. But are his acts of disposal before removal valid, like those of a *zimmee* or a slave? Though authorities differ on this point, the current opinion is that the acts are not operative. Authorities also differ as to the minor's remaining an executor after he has attained to puberty, if he has not been removed by the judge; Aboo Huneefa saying that he does not continue to be executor, while Aboo Yoosuf maintained that he does, and Moohummud agreed with him in opinion.

of a person who is weak and inefficient.

When a person has been appointed an executor who is weak and inefficient, the judge should add another to him. If the executor should himself represent his incapacity, the judge is not to allow it on his mere representation, nor until he ascertain the fact; but if it is manifest that he is really incompetent, the judge should appoint another in his stead. When an executor is an *ameen* able to dispose of property, the judge is not to remove him from office. So, also, when the heirs complain of an executor to the judge, he ought not to remove him without malversation; but when that is established, he should remove him.

Power of a single executor when several are appointed.

When a man has appointed two executors, one of them, according to Aboo Huneefa and Moohummud, cannot alone dispose of the property; and acts done by either of them singly are not operative without the sanction of the other, except in some special matters. Thus, one may act sepa-

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rately as to the washing and shrouding of the deceased's body, and its removal to the grave; the payment of debts out of assets of the same kind as the debts; the delivery of specific bequests; the restoration of deposits or of things usurped by the deceased, or acquired under defective sales; the manumission of a specific slave; and the general preservation of his property.[1] But they cannot act singly in taking possession of deposits belonging to him, nor in receiving payment of debts due to him; though they may in suing for his rights. According to the same authorities, they may also act separately in accepting a gift for a minor, sanctioning his acts, making partition of things weighable or measurable, and selling what is liable to spoil. When the deceased has directed such and such parts of his property to be bestowed in charity, on beggars and indigent persons, without specifying them, one executor cannot act separately from the other, according to Aboo Huneefa and Moohummud, though he may do so according to Aboo Yoosuf; and if the objects of the charity are specified, he may act alone, according to them all. In what has been said, it is supposed that the two executors have been appointed together in one sentence (*kulám*). And if the testator should first appoint one and then the other, there is a difference of opinion among 'our' sheikhs, according to Hulwaee; some of them saying that here each of the executors may act separately, while others say that, according to Aboo Huneefa and Moohummud, they cannot act separately in disposing of property in any case; and this has been adopted by Surukhsee. If, however, two are appointed, and it has been said, 'Each of you is a complete executor (*wusee tamm*),' each one of them may dispose of the property alone.

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[1] The last part of the sentence is added from the *Hidayah*, vol. iv., p. 1043. None of the acts imply a disposal of property, except the shroud, which the author of the *Hidayah* expressly says may be *purchased* by one of the executors, and the hiring of bearers for carrying the body to the cemetery, which may also be done by one.—*Fut. Al.*, vol. vi., p. 217.

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An executor appointed for a special purpose is executor generally.

When a person appoints an executor for a particular purpose, as by saying, 'I have appointed thee my executor to pay my debts,' and says to another, 'I have appointed thee my executor in the administration of my property,' or by saying, 'I have appointed such an one my executor to pay my debts, and do not appoint him for anything else, and I have appointed such another my executor for all my property,' each one is executor in all matters, according to Aboo Huneefa and Aboo Yoosuf, as if he had appointed them both for all matters; but according to Moohummud, each is restricted to the particular matter for which he has been appointed. And where it is made an express condition that one shall not be executor in the matter to which the other is appointed, it has been said by Moohummud Ben Alfuzl that the matter is as conditioned, according to all opinions; and it is only where he has not made such condition that there is the difference of opinion above mentioned; the *futwa* being with Aboo Huneefa.

When one of two executors dies, the survivor cannot act without authority from the judge.

When a man has appointed two executors, and one of them dies, the survivor cannot, according to Aboo Huneefa and Moohummud, dispose of the property, but should lay the matter before the judge, who, if he see proper, may make him sole executor, and transfer to him the power of disposal, or add to him another in the place of the deceased. According to Aboo Yoosuf, however, the survivor can act alone, as, in his opinion, he was competent to do while the other was alive. Though one of the executors should accept after the death of the testator, and the other should not accept, or, though one of them should die before the testator and before acceptance by the other, the single executor is incompetent to act by himself, according to Aboo Huneefa and Moohummud; while, according to Aboo Yoosuf, he is competent. If one of two executors is profligate, the judge may authorize the other to act singly, or may add another to him instead of the profligate, in which case the just one could not act without the other, according to Aboo Huneefa and Moohummud, while according to Aboo Yoosuf he could.

A person having appointed two executors, one of them

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dies, having first appointed his fellow to be his executor. This is lawful, and the fellow may dispose of the property of the first deceased: for, as he could have done so with the sanction of his co-executor in his lifetime, so he can, in like manner, do so after his death. There is another report, however, against the legality of the disposal; but the first is correct.

Unless the deceased one has appointed him his executor.

If a person should appoint an executor, and say, 'Act with the knowledge of such an one,' the executor may act without his knowledge. But if the words were, 'Do not act without the knowledge of such an one,' it would not be lawful for him to act without his knowledge; and the *futwa* is to that effect. If he should say, Act with the opinion of such an one,' or 'Do not act except with the opinion of such one,' in the first case the person addressed would be the executor, in the second they are both executors, according to what is approved. Aboo Nusr has said, that if the words were 'Act in the matter with the orders of such an one,' he is executor specially; while if the words were, 'Do not act without his orders,' both would be executors; and this seems probable, according to the doctrine of 'our' masters.[1] When a man appoints one person his executor, and another *mooshrif*, or inspector, to him, the first is the executor for the purpose of taking possession of the property, and the *mooshrif* is not an executor; the effect of the appointment being that the executor cannot act without his knowledge.[2]

Effect of a direction to act with the knowledge, opinion, orders, or under the inspection of another.

A man, addressing a number of persons, says to them, 'Do so after my death.' If they accept, they all become executors; and if they remain silent till the testator's death, and two or more then accept, these become executors, and may lawfully carry the will into execution. But if only one of them accepts, though he is the executor, he cannot lawfully carry the will into execution without bringing the matter before the judge, who may either appoint another to act with him, or authorize him to act by himself.[3]

Effect of appointment of several to act when they do not all accept.

[1] Vol. vi., p. 218. [2] *Ibid.* p. 219. [3] *Ibid.*

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Executor of an executor.

An executor may, on the approach of death, appoint a successor, though the deceased had not committed that power to him.[1] A person may lawfully appoint one of his heirs to be his executor; and if the heir should die after the testator, and appoint another to be his executor, saying, 'I have made thee executor of my property and of that of the first deceased, whose executor I am,' the second would be executor of both estates together. And though he should say, 'I have appointed thee executor,' without adding anything more, the second would be executor of both estates, according to 'us.' But if he should say, 'I have appointed thee executor in both estates,' though he would be executor as to both according to Aboo Huneefa, he would be so only of the second deceased, according to his two companions. When a man has appointed a person his executor and a third party has appointed the testator his executor, and the second testator then dies, the first is his executor; and if the first should die without making another appointment, his executor is executor of both together.[2]

Executor may take possession of the deceased's property and deposits in his hands.

When a person has died, having deposits in his hands belonging to several parties, and also leaving property, but being in debt to its full amount, his executor may lawfully remove the deposits from his house for the purpose of restoring them to their owners, and take possession of the property to pay his debts; and if he should do so, and what he has removed, or taken possession of, should happen to perish in his hands, he is not responsible for the loss. And, in like manner, though the deceased were not in debt, and the executor should remove his property from his house, and it should perish in his hands, he would not be responsible.[3] So also an executor may exact payment of debts due to his testator, and take possession of all his rights.[4]

Moohummud has said that the executor of a father may

[1] Vol. vi. p. 217.

[2] The last paragraph, excepting the first sentence, will be found in vol. vi., p. 218.

[3] *Fut. Al.*, vol. vi., p. 233. [4] *Inayah*, vol. iv., p. 613.

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Partition by a father's executor acting for the heirs.

enter into a partition of property for young children, whatever the property may be, and whether moveable or immoveable, with a slight inadequacy in the terms (*ghubn-yuseer*), but not if the inadequacy be glaring (*ghubn-fahish*); the principle in these cases being, that he who has the power to sell a thing, has the power to make a partition of it.[1] And when all the heirs are minors, and the executor has made a partition with a legatee, giving him his third and holding two-thirds for the heirs, the partition is lawful; so that if what is in his hands of theirs should happen to perish, they have no right of recourse against the legatee, nor is the executor responsible to them on account of the loss. When some of the heirs are adult and absent, it is lawful for the executor to make a partition on their behalf with the legatee, in everything except *akár* or what is immoveable, and to hold the shares of the minors. But if the heirs are all adult, or some of them adult and present, a partition made by the executor with the legatee is void as against the adult heirs, both with respect to moveable and immoveable property. And if the heirs are adult and absent, a partition of immoveable property made by the executor with the legatee is void, as against the heirs.

Acting for the legatees.

If an executor should make a partition to or in favour of heirs, when there are legacies to mankind (that is, for secular purposes) against the estate, and the legatee is absent, the partition is not lawful, and the legatee may still claim to be a partner with the heirs, that is, for a third of what remains if the portion allotted to him should perish.[2] But a partition by the judge, and the taking possession by him of the legatee's portion, is valid; so that if the portion should perish in the hands of the judge or his *ameen*, the legatee would have no right of recourse

Partition by the judge.

[1] The legatee of a third, or other share of the estate is a partner with the heirs, and the executor may be called upon by either party to make a partition. But this is beyond his proper function, and his power to interfere seems entirely to depend on the relation which the deceased bore to the heirs.

[2] *Doorr ool Mookhtar*, p. 836.

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against the heirs, neither would the judge be responsible. This, however, is only when the things are measurable or weighable, a partition of which is a separation. But with respect to things that are not so, the partition, being an exchange like a sale, is unlawful, for it is not lawful to sell another person's property.[1] And when the judge has appointed a guardian (*wusee*) for an orphan in all things, and he has made a partition against him whether of moveable or immoveable things, the partition is lawful; but if the appointment is only for a special purpose, as for the maintenance of the orphan or the conservation of his property, the partition is not lawful.

Or an executor appointed by him.

By a mother's executor.

The executor of a mother may make a partition on account of minor children of moveable property which they have inherited from her, when they have no father nor father's executor, but he has no such power when there is either of these; and he cannot make a partition of immoveable estate under any circumstances, nor of anything that the minor has inherited from any other than his mother, whether it be moveable or immoveable.[2] And what has been said with respect to the executor of a mother is equally applicable to the executor of a brother and paternal uncle.

Partition by an executor among heirs.

When an executor makes a partition among heirs, and they are all minors, without any admixture of adults, the partition is unlawful. If they are all adults, but some of them absent, and a partition is made with those who are present, and their shares separated from the mass, the partition is lawful with respect to chattels, but not as to immoveable property. If there are both minor and adult heirs, but the adult are absent, the partition is unlawful. If the adults are present, and their share is given up to them, and the shares of the minors separated from them in a mass without partition among the individual minors, the

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[1] *Doorr ool Mookhtar*, p. 836.

[2] The power of the father's executor to make a partition extends to the whole of the minor's property, for it is commensurate with the power to sell, for which, see next page.

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division is lawful. When the share of each minor or adult is separated from the rest, the whole partition is invalid. But if the share of the adult is surrendered to them, and the portion of the minors retained, and then divided among them, the partition as between the adults and the minors is valid.

Sale by a father's executor.

When a father's executor has sold anything belonging to the estate of the father, the case presents two aspects. The first is when the deceased has left neither debts nor legacies; the second is when he has left one or other of these. With regard to the first, it is said in the book [1] that the executor may sell the whole property, moveable and immoveable, when the heirs are minors. But Hulwaee has said that this was the opinion of the ancients, and that, according to the moderns, the *akár*, or immoveable property, of a minor can be sold only (that is, when there are no debts nor general legacies), if the minor has occasion for the price of it, or a purchaser is eager to obtain it by giving double its value, or the sale is otherwise for the minor's advantage, as, for instance, when the *khuraj*, or land-tax, and expenses exceed its income; or the property, being shops or a mansion, is falling to decay. With regard to the land-tax, when a necessity arises for paying it, and there is belonging to the estate any other property besides *akár*, the other property is first to be applied to its payment; and if that is not sufficient, the *akár* may then be sold for its value, or a price not much less than its value; but the executor cannot lawfully sell it at a greater depreciation than men would usually submit to. And, in like manner, an executor cannot lawfully purchase for a minor anything at a price much above its value. When the heirs are all adult and present, the executor can sell no part of the estate except by their directions; and if they are absent, he cannot lawfully sell the *akár*, though he may sell anything but the *akár* (and let the whole to hire), because he has the power of conservation

When there are no debts nor legacies.

[1] That is, the Koodooree. See note [4] page 658 *ante*, also *Inayah*, vol. iii., p. 319.

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over the property of an absentee, and it may be necessary to sell chattels in order to preserve them; but *akár*, or immoveable property, is secure in itself, except in the case of its falling into decay, and in that case it also may be sold. When all the heirs are adult, and one of them is absent while the others are present, the executor may sell the share of the absentee, in all that is not *akár*, for the sake of preserving it, according to all opinions, and the shares of those who are present also, according to Aboo Huneefa; but according to both his companions, the sale of their shares is unlawful. In all that has been said, it is assumed that there are no debts nor legacies. But if there are debts, and they cover the whole of the estate, the executor may sell the whole by general agreement; and when the debts do not cover the whole estate, he may sell as much of it as may be necessary for their payment. He may also sell the surplus, according to Aboo Huneefa; but this was contrary to the opinion of his companions. When, however, an executor has actually sold *akár*, or immoveable property, for the payment of debts, while he has other property in his hands sufficient for that purpose, the sale is lawful.[1] And if there are general legacies, the executor may sell as much of the property as may be necessary for their liquidation (not exceeding, of course, a third of the whole after payment of the debts). And if there be among the heirs one minor, and all the rest are adults, and neither debts nor legacies, the estate consisting entirely of chattels, the executor may sell the share of the minor, according to all, and the shares of the others, according to Aboo Huneefa; so that if he should sell the whole, the sale would be lawful according to him, but it would not be lawful according to the other two, as to the shares of the adults; the principle of the former being that, whenever the executor has power to sell a part of the estate, he has power to sell the whole.[2]

When there are debts;

or legacies.

[1] Vol. iv., p. 219.

[2] The power to sell for payment of debts and legacies seems to belong to all executors, and not to depend on the relation of the testator to his heirs.

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The executor of a father is in the place of a father. So also the executor of a grandfather is in the place of a father's executor, and the executor of a grandfather's executor is in the place of the grandfather's executor. And the executor of the judge's executor is in the place of the judge's executor when his appointment was general.

The executor represents the deceased in relation to the heirs.

With regard to the executor of a mother or a brother, —when a mother has died leaving property and a minor son and having appointed an executor, or a brother has died leaving property and a minor brother, and having appointed an executor, the executor may lawfully sell anything but *akár* belonging to the estate of the deceased, but can neither sell the *akár*, nor lawfully buy anything for the minor but food and clothing, which are necessary for his preservation. The executor of a mother has no power to sell anything that a minor has inherited from his father, whether moveable or immoveable, and whether the property be involved in debt or free from it. But what he has inherited from herself when it is free from debts and legacies, the executor may sell what is moveable, but he cannot sell *akár*. If the estate is involved in debt or legacies, and the debt is such as to absorb the whole, he may sell the whole, the sale of *akár* coming within his power; and if the debt does not absorb the whole, he may sell as much of it as is necessary to defray the debts, and as to his power to sell the surplus there is the same difference of opinion as has been stated above. If all the heirs are adult and present, the estate being free from debt, the mother's executor can sell no part of her estate; and if the estate is in debt, the answer to be given as to the power of the mother's executor is like that in the case of the father's executor, both in respect of matters in which opinions agree and in which they differ. And if there are both adult and minor heirs, and the adult are absent, the estate being free from debt, the mother's executor may sell what is moveable of her estate, whether it belongs to the share of the minor or the adult, but cannot sell the *akár* of her estate, the shares of minors and adults being in this case the same. And if the estate be involved in debt

Sale by the executor of a mother, brother, or paternal uncle.

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the answer to be given as to the power of the mother's executor is like the answer in the case of the father's executor. If the adults are present and the estate free from debt, the executor may sell the minor's share of her moveable estate; but whether he can sell the share of the adults, opinions differ; while he certainly cannot sell the *akár*. And if the estate be involved in debts or legacies, and the debts absorb the whole, he may sell the whole, and if they do not he may sell the moveable and as much of the *akár* as may be necessary for the payment of debts, and as to the surplus there is the difference among 'our sheikhs' already mentioned. Whatever has been said as to the executor of the mother is true of the executor of the brother, and the paternal uncle; the principle being that the power of the executor is measured by the power of his testator.

An executor is responsible if he pay a debt without proof;

A man having appointed two executors, dies, and a claim is made against his estate, which they pay without proof:—they are responsible to the creditors of the deceased for what they have paid. But when an executor has paid a debt of the deceased to which there are witnesses, the payment is lawful, and he does not incur any responsibility.[1] Whether he can pay when two just persons testify to a debt in his presence, but do not testify to it before the judge, and the debt is denied by the heirs, is a point on which 'our' sheikhs have differed, some saying that he may pay the debt, and others that he may not.[2]

or one creditor in preference to the others, without the order of a judge.

If an executor pays the debt of one creditor without an order of the judge, he is responsible to the other creditors; but not so if he pays by the judge's order.[3] When an executor has expended the whole of an estate upon young children, and nothing remains, after which a claim is made against the estate, and is established by proof before the judge who decrees it, can this creditor make the executor liable? No mention is made of the case in the Book,[4] but it seems that if the expenditure was made by order of

[1] *Fut. Al.*, vol. vi., p. 216.
[2] *Ibid.*, p. 235.
[3] *Ibid.*, p. 235.
[4] See *ante*, p. 658, note.

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the judge, the executor is not responsible, whereas if it were made without the judge's order, he is liable. When a debt has been made obligatory on the estate of the deceased by the decree of a judge, and the executor has paid it, after which another debt arises against the deceased, as, for instance, if he had dug a well in his lifetime into which a beast has fallen so as to make him liable for the damage, or if he had sold a piece of armour which the purchaser returns to the executor on account of a defect, so as to make its price a debt against the deceased, is the executor in any way responsible? If he paid by order of the judge, he is not liable; nor is the judge. But the second creditor may have recourse against the first for a share of what he received, proportionate to the debt, if what he received be still subsisting; and if it has perished in his hands, he is responsible to the second in the same proportion; but the executor is in nowise liable. If, on the other hand, the executor had paid without the order of the judge, the second creditor may claim, either from the executor or the first creditor, a due proportion of what was received by the latter.[1]

But he may sell to him part of the estate in exchange for his debt.

When an executor wishes to pay a debt to a creditor, and is apprehensive of other creditors appearing against the deceased, he may sell something belonging to the estate to the creditor in exchange for the debt, and will not then be responsible should another creditor appear as apprehended.[2]

How an executor may and may not employ the estate of a *minor*.

An executor may give out the property of a minor in *moozarubut*, but he cannot lawfully give a long lease of part of the deceased's estate for the payment of debts, nor lend the property of a minor, according to all reports; and if he should do so, he would be responsible Neither is it competent to the judge to lend the minor's property, nor for a father to do so according to the correct doctrine.[3] If an executor or a father should pledge the property of an orphan for his own debt, the pledge ought not by analogy

[1] *Fut. Al.*, vol. vi., p. 233. [2] *Ibid.*, p. 235.
[3] *Ibid.*, p. 227.

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to be lawful, but it is so on a liberal construction of law. But it is not lawful for the executor to pay his own debt with property of the orphan. If, however, a father should do so it would be lawful. And an executor may sell the orphan's property in exchange for his own debt to his creditor, according to Aboo Huneefa and Moohummud, and the price becomes a set-off against his debt; but he is responsible to the minor.[1] And when an executor sells the orphan's property to himself, or his own to the orphan, the sale is lawful, according to Aboo Huneefa, and Aboo Yoosuf also, by one report, when the sale is obviously for the benefit of the orphan, though unlawful when not obviously for his benefit. According to Moohummud, and Aboo Yoosuf by another and more probable report, such a sale is unlawful under any circumstances. And when an executor of two orphans sells the property of one of them to the other, the sale is unlawful. So, also, when he authorizes them to enter into such a transaction with each other, and one accordingly sells his property to the other, the sale is unlawful.[2]

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[1] *Fut. Al.* vol. vi., p. 228. [2] *Ibid.*

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BOOK XI.

OF FURAIZ OR INHERITANCE.

CHAPTER I.

OF THE DEFINITION OF 'FURAIZ,' AND THE PURPOSES TO WHICH THE 'TURKUT,' OR PROPERTY LEFT BY A DECEASED PERSON, IS APPLICABLE.

Definition.

'FURAIZ' is the plural of *fureezut*, a derivative from *furz*, which, as rendered in the dictionaries, means, 'appointment, precision, explanation,' and is applied in law to anything that is established by precise and conclusive evidence. This branch of law is termed *furaiz* because the *sihams*, or shares in a deceased person's property, have been expressly appointed or ordained, and are based or established on precise and conclusive evidence. So that there is an agreement between the ordinary and legal acceptations of the word.

Funeral expenses are first to be paid.

The estate of a deceased person is applicable to four different purposes—his funeral, his debts, his legacies, and the claims of his heirs. The funeral comprises the washing, shrouding, and interring of his body; all of which are to be performed in a manner suitable to his condition; and for the necessary expenses incurred thereby all his property is liable, save only property which is subject to some special charge, as a pledge, for instance, to which the pledgee has a preferable right.

Then debts.

Debts are next to be paid; and debts may be wholly of health or wholly of sickness, or partly of health and

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partly of sickness. If they are wholly debts of health, or wholly debts of sickness, they are all alike, and none is entitled to any preference. If they are partly debts of health and partly debts of sickness, the former are preferred if the latter can be established only by the acknowledgment of the deceased. But when the debts of sickness can be established by proof, or have been openly incurred for known causes, such as the purchase or destruction of property, or the proper dower of a wife, the debts of sickness are on the same footing as those of health. Debts not actually due at the time of the debtor's death become payable immediately on the occurrence of that event, because the privilege of postponement is a personal right which dies with him. The death of a creditor has not the same effect, because the person to whom the right of delay belongs is still alive.[1]

Next legacies to the extent of a third of the residue.

Legacies are next to be paid out of a third of what remains after payment of funeral expenses and debts, unless the heirs allow them beyond a third. Then the residue is to be divided among the heirs, according to their shares in the inheritance. This, or the preference of a legatee to the heirs, is only when the legacy is of something specific; for if it be a confused legacy, as the bequest of a third or a fourth, it has no right to preference. Nay, the legatee in that kind of legacy is a partner with the heirs, and his interest rises or falls with any increase or diminution of the testator's estate.

Grounds of inheritance.

The right to inheritance is founded on three different qualities—*nusub*, which is *kurabut*, or kindred; special cause, which is marriage, that is, a valid marriage, for there are no mutual rights of inheritance by a marriage that is invalid or void, according to all;[2] and *wula*, which is of two kinds—*wula* of emancipation, and *wula* of *moowalat*, or mutual friendship; the superior being the heir

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[1] *Jowhurrut-oon-Neyyevah*, chap. *Morábukut*.

[2] *Doorr ool Mookhtar*, p. 852. From which it appears that, with regard to this effect of an invalid marriage, there was no difference of opinion between Aboo Huneefa and his two disciples.

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to the inferior in both kinds, and not the inferior to the superior, unless when there is a special condition, as when he has said, 'If I die, my property is an inheritance to these,' when the inferior would be heir to the superior.

Three different kinds of heirs.

There are three different kinds of heirs—*ashab ool furaiz*, or sharers, *asubát*,[1] or agnates, and *zuvool arham*, or uterine relatives. The two last have been termed, from their position in the inheritance, residuaries and distant kindred.[2] The sharers are first; then the residuary by *nusub*, or kindred; then the residuary for special cause, or the emancipator, whether male or female;[3] then the residuary of the emancipator. After this, there is the return; that is, when there are sharers, but none of these residuaries, the surplus, if any, reverts to the sharers, and is divided among them in proportion to their shares. Next are the distant kindred. After them the *mowla* of mutual friendship. Then a person in whose favour the deceased has made a declaration of *nusub*, or descent, as against another, but not such as to establish his descent, and has persisted in such declaration to his death. In this three conditions are implied. The declaration of descent must be as against another, as, for instance, when the deceased has declared a person of unknown descent to be his brother, which involves a declaration against his father that the person is his son. The declaration must be such as not to establish the descent of the person acknowledged, as when it is not acquiesced in by the father. And the acknowledger must die without retracting his acknowledgment.[4] The person next in succession is one to whom the deceased has bequeathed the whole of his property. And, lastly, the *beit-ool-mal*, or public treasury.

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[1] Pl. of *asubut*, usually pronounced *asubah*.

[2] By Sir William Jones, in his translation of the *Sirajiyyah*.

[3] *Shureefea*, p. 9.

[4] *Shureefea*, p. 11.

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CHAPTER II.

OF SHARERS.

Twelve sharers.

SHARERS are all those for whom shares have been appointed or ordained in the sacred text, the traditions, or with general assent. And they are in number twelve persons; of whom the rights of ten are founded on *nusub* or kindred, and of two on special causes. Of the former there are three males, and seven females. The first of the males is the father, who has three states or conditions: One when he has merely a share, which is a *sixth*; and it is when the deceased has left a son or son's son how low soever. Another when he is merely the residuary; and that is when there is no successor but himself, and he takes the whole property as residuary, or when there is only a sharer with him, who is not a child, nor child of a son (how low soever), as a husband, a mother, or a grandmother, and the sharer takes his share, and the father takes what remains as residuary. And the third state is when he is both a sharer and the residuary; as when there are with him a daughter and a son's daughter, and he has a sixth as a sharer, the daughter a half,—or two thirds when there are two or more daughters,—the son's daughter a sixth, and the father the remainder as residuary. The second of the males entitled by *nusub* is the true grandfather, and he is defined to be one into whose line of relationship to the deceased no mother enters, as the father's father, or the father's father's father; one into whose relationship to the deceased a mother enters being termed a false grandfather, as the father of the father's mother. The true grandfather is entirely excluded by

Ten of which are by *nusub*.

Three males.

1. The father.

2. True grandfather.

False grandfather—who?

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the father; but in default of him comes into his place, save that he does not, like him, reduce a mother's share to a third of the residue, nor entirely exclude a paternal grandmother. He excludes, however, all the brothers and sisters of the deceased, according to Aboo Huneefa, with whom the *futwa* concurs. The third of the males entitled by *nusub* is the half-brother by the mother, whose share when there is but one is a sixth; or when there are two or more of them, a third, which is equally divided among them all.

3. Half-brother by the mother.

Of females who are entitled by *nusub*, the first is the daughter, whose share when she is alone is a *half*; and when there are two or more daughters, they have two thirds between them. When there are both sons and daughters, the sons make the daughters residuaries with them, the share of each son being equal to that of two daughters. The second are the son's daughters, who, when there is no child of the loins, are like daughters, one taking a half, and two or more taking two thirds between them. When there is a son, the children of a son take nothing; when there is one daughter, she takes a *half*, and the son's daughters have a sixth; and if there are two daughters, they take *two thirds*, and there is nothing for the son's daughters. That is, when there is no male among the children of a son; but if there is a male he makes the females (whether his sisters or cousins) residuaries with him; so that if there were two daughters or more of the loins, they would have two thirds between them, and the remainder would pass to the children of the son, in the proportion of two parts to the males and one part to the females. Though the male were in a grade below them, he would make them residuaries with him; so that the remainder would be between him and them in the same proportion, or two parts to each male, and one to each female. Thus, if there were two daughters, a son's daughter, the daughter of a son's son, and the son of a son's son, the daughters would take two thirds, and the remainder be between the son's daughter and all below her, in the proportion of two parts to the male, and one part to

Seven females:—
1. The daughter.

2. Son's daughter.

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each female. The principle in this case is, that a son's daughter becomes a residuary with a son's son, whether he is in the same or a lower grade with herself,—when she is not a sharer.[1] The third of the females entitled by *nusub* is the mother, who, like the father, has three states or conditions. One when there is with her a child or child of a son, how low soever, or two or more brothers or sisters of the whole or half blood, and on whatever side they may be, and then her share is a *sixth*. Another when there are none of these, and then her share is a *third*. And a third case is when there is a husband or a wife, and both parents: and then the mother has a third of what remains, after deducting the share of the husband or wife, and the residue is to the father according to all opinions. But if in the place of the father there were a grandfather, the mother would have a third of the whole property for her share. The fourth is the true grandmother, as the mother's mother how high soever, and the father's mother how high soever. Everyone into whose line of relationship to the deceased a mother enters between two fathers is a false grandmother. The share of the true grandmother, on the father's or the mother's side, is a *sixth*, whether there be one or more; all partaking of it equally who are in the same degree. When there are two grandmothers, one of whom is related to the deceased on both sides, and the other only on one side, Aboo Yoosuf has said, and there is one report to the same effect from Aboo Huneefa, that the *sixth* is to be divided between them equally, and the *futwa* is in accordance with this opinion. The fifth are full sisters, and their share is a *half* when there is only one, and *two thirds* when there are two or more. When there is a full brother with them, the male has the share of two females; and when there are daughters, or daughters of a son, the full sisters take the residue.[2] The sixth are half sisters by the father, and they are like

3. The mother.

4. The true grandmother.

False grandmother—who?

5. Full sisters.

6. Half-sisters by the father.

[1] This qualification prevents any injury to her by the application of the principle. See *M. L. I.*, second ed., p. 39.

[2] For the reason, see *ibid.*, p. 40.

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full sisters when there are none, one taking a *half* and two or more *two thirds* in that case; with one full sister they take a *sixth*, which makes up the two thirds. But with two full sisters they have no portion in the inheritance, unless there happens to be with them a half-brother by the father, to make them residuaries, when the full sisters take their two thirds, and the children of the father only have the residue between them, in the proportion of two parts to the male, and one part to each female. The seventh are half-sisters by the mother; of whom, when there is one, she takes a *sixth*, and when there are two or more, they take a third. But all brothers and sisters are excluded by a son or son's son, how low soever, or a father, by general agreement, and also by a grandfather, according to Aboo Huneefa. And children of the father (that is, half-brothers and sisters on his side) are excluded not only by these, but also by a full brother; and children of the mother (or half-brothers and sisters on her side) are excluded by a child, though a daughter, and by the child of a son, a father, and a grandfather by general agreement.

7. Half-sisters by the mother.

The two sharers who are entitled for special cause are the husband and wife. The share of a husband is a *half*, when there is no child nor child of a son how low soever; and a *fourth* with a child or child of a son. The wife's share is a *fourth* in the former of these cases, and an *eighth* in the latter; the fourth or eighth, as the case may be, being equally divided among all the wives when there are more than one.

Sharers for special cause.

Husband.

The shares appointed or ordained by the sacred text are six in number:—a half, a fourth, an eighth; and two thirds, one third, and a sixth. A half is appointed for five different persons. It is the share of a husband when the deceased has left neither a child nor child of a son; the share of one daughter of the loins, and the share of a son's daughter when there is no daughter of the loins; and the share of the full sister, and of the half-sister on the father's side when there is no full sister. A fourth is the share of two persons, that is, of a husband when the deceased has left a child, or a child of a son, and of a wife

Number of shares, and the persons entitled to them.

A half.

A fourth.

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or wives when he has left neither child nor child of a son.

An eighth. An eighth is the share of one or more wives, when the deceased has left a child or child of a son.

Two thirds. Two thirds are the share of four different persons—the share of two daughters or more of the loins; the share of two or more daughters of a son, when there is none of the loins; the share of two full sisters or more, or two half-sisters by

A third. the father, when there is no full sister. A third is the share of two persons—that is, of a mother, when the deceased has left neither a child nor child of a son, nor two brothers or sisters; and the share of two children or more of a mother, whether they be male or female. And

A sixth. a sixth is the share of six persons. The share of a father, when the deceased has left a child or child of a son; the share of a grandfather, when there is no father; the share of a mother, when the deceased has left a child or child of a son, or two brothers or sisters; the share of a single grandmother, or of several grandmothers when there are more at the time of inheriting; the share of a son's daughter with a daughter of the loins, to make up two thirds; and the share of one child of the mother, whether male or female.

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CHAPTER III.

OF ASUBÁT OR RESIDUARIES.

THE Asubát are all persons for whom no share has been appointed, and who take the residue after the sharers have been satisfied, or the whole estate when there are none. They are of two kinds: residuaries by *nusub*, or kindred to the deceased, and residuaries for special cause. Of the former there are three classes: residuaries by themselves or in their own right, residuaries by another, and residuaries with another. Three classes of residuaries.

The residuary by himself or in his own right is defined to be 'every male into whose line of relation to the deceased no female enters;' and such residuaries are of four sorts—the offspring[1] of the deceased, and his root; the offspring of his father, and the offspring of his grandfather. Hence the nearest of the residuaries is the son; then the son's son, how low soever; then the father; then the grandfather, or father's father, how high soever; then the full brother, then the half-brother by the father, then the son of the full brother, then the son of the half-brother by the father,[2] then the full paternal uncle, then the half paternal uncle by the father, then the son of the full paternal uncle, then the son of the half paternal uncle by the father,[3] then the full paternal uncle of the father, then the half paternal uncle of the father on the father's 1. Residuary in his own right.

[1] *Jooza*, literally part of the deceased.

[2] Then their sons, how low soever, in the same manner, the full blood being preferred to the half-blood at each stage of descent.—*Sirajiyyah*, pp. 48, 49.

[3] Then their sons how low soever.—*Ibid.*

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side, then the son of the father's full paternal uncle, then the son of the father's half paternal uncle on the father's side, then the paternal uncle of the grandfather, then his son how low soever.[1]

When there are, several, the estate is divided equally between them.

When there are several residuaries in the same degree the property is divided between them by bodies, not by families (*per capita* and not *per stirpes*). As, for instance, when there is a son of one brother and ten sons of another, or the son of one paternal uncle and ten sons of another, the property is to be divided into eleven parts, of which each takes one part.

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[1] The *Mubsoot* is the authority cited, and it is confirmed by the *Doorr ool Mookhtar*, p. 854. To these I can now add the *Sirajiyyah*, though the direct detail of the residuaries stops at the sons of the paternal uncles, and I failed, when preparing 'The Moohummudan Law of Inheritance,' to observe that it is carried, by implication, to the full extent of the paternal uncles of the grandfather. Thus, the author, after stating that the son of the full brother is preferred to the son of the half-brother by the father, proceeds to say that 'The same rule is applicable to the paternal uncles of the deceased, then to the paternal uncles of his father, and then to the paternal uncles of his grandfather;' words that are plainly inconsistent with a limitation of the succession to the offspring of the 'nearest grandfather,' as might, at first sight, be inferred from Sir William Jones's translations of the passage. See the examination of it in the treatise above mentioned, 1st ed., p. 78, 2nd ed., p. 47. The detail of the residuaries is not carried farther in any of the authorities than the uncles of the grandfather; but it would have been superfluous to do so, as the grandfather had been already defined to be a father's father, *how high soever*. So that the detail is, in reality, co-extensive with the definition, and the succession of residuaries in their own right as unlimited in the collateral as it is in the direct line, where it is expressly said to be 'how low and how high soever.' In several cases decided by the superior courts in India, descendants of a great-grandfather have been found entitled to succeed as residuaries. See Bhanoo Beebee *versus* Imam Bukhsh, *Rep. S. D. A. Calcutta*, vol. i., p. 68; Sheikh Moohummud Bukhsh *versus* Shurf-oon-Nissa Begum, *M. L. I.*, p. 82; and Mohadeen Ahmud Khan *versus* Syed Mohamed and another, High Court of Madras Reports, vol. i., p. 92, and *Indian Jurist Reports*, p. 132. See farther, *M. L. I.*, 2nd. ed., p. 50, where it is inferred from a passage in the *Shureefeea*, p. 176, that there is no limit to the succession of the residuaries in the collateral, any more than in the direct line.

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Residuaries by another.

The residuary by another is every female who becomes or is made a residuary by a male who is parallel to her; and such residuaries are four in number: a daughter by a son, a son's daughter by a son's son, a full sister by her brother, and a half-sister by the father, by her brother. The remaining residuaries, that is, all besides these, take the residue alone, that is, the males take it without any participation of the females: and they are also four in number; the paternal uncle and his son, the son of a brother, and the son of an emancipator.

Residuaries with another.

The residuary with another is every female who becomes a residuary with another female; as full sisters or half-sisters by the father, who become residuaries with daughters or sons' daughters.

Residuaries of a *wulud-ooz-zina*, and son of a *mooláunah*.

The residuaries of a *wulud-ooz-zina* and of the son of an imprecated woman are the *moowalees*[1] of their mothers; for they have no father, and the *kurabut*, or kindred of their mother inherit to them, and they inherit to them. So that if the son of an imprecated woman should leave a daughter, a mother, and the imprecator, the daughter would take a half, the mother a sixth, and the remainder would revert to them as if he had no father. If besides these there were also a husband or a wife, he or she would take his or her share, and the remainder be between the others, either as share or as return. And if he should leave his mother, a half-brother by the mother, and a son of the imprecator, the mother would take a third, the half-brother by the mother a sixth, and the remainder would revert to them, there being nothing for the son of the imprecator, as the deceased has no brother on the side of the father. When the child of the son of

[1] Pl. of *Mowla*, which signifies both emancipator and emancipated, though it also means the son of a paternal uncle. It is here, I think, to be taken in the sense of emancipated; in which sense it occurs in a section of the *Fut. Al.*, vol. ii., p. 490, that treats of appropriations for the benefit of *Mowalees*, *moodubburs*, and *oom-i-wuluds*. The mothers in the text would thus be women free by origin who had emancipated slaves, and whose freedmen would become residuaries to their illegitimate children. See *Doorr ool Mookhtar*, p. 855.

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an imprecated woman dies, the family of his father inherit to him, being his brothers; but the family of his grandfather, who are his paternal uncles, and their children, do not inherit to him. The same is true of the *wulud-oozzina*, except that there is a difference between them in one case, which is that the *tuwam*, or twin of the *wulud-ooz-zina*, inherits only as a half-brother by the mother, while the twin of an imprecated son inherits as a full brother.[1]

Among residuaries of different kinds, the nearest is preferred.

When there are several residuaries of different kinds, one a residuary in himself, another a residuary by another, and the third a residuary with another, preference is given to propinquity to the deceased; so that the residuary with another, when nearer to the deceased than the residuary in himself, is the first. Thus, when a man has died, leaving a daughter, a full sister, and the son of a half-brother by the father, a half of the inheritance is to the daughter, a half to the sister, and nothing to the brother's son, because the sister becomes a residuary with the daughter, and she is nearer to the deceased than his brother's son. So, also, when there is with the brother's son a paternal uncle, there is nothing to the uncle. And in like manner when in the place of the brother's son there is a half-brother by the father, there is nothing for the half-brother.[2]

Residuary for special cause.

The residuaries for special cause are the emancipator, and then his residuaries in the same way as has been already mentioned.

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[1] A man may deny one of twins and acknowledge the other, but in that case the paternity of both is established (*Hidayah*, vol. ii., p. 325); so that each is full brother or sister to the other.

[2] Because strength of propinquity, or being the master of two propinquities, is preferred to being master of one.—*M. L. I.*, 2nd. Ed. p. 57.

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CHAPTER IV.

OF 'HUJUB,' OR EXCLUSION.

Exclusion: Partial. Total.

EXCLUSION is of two kinds—partial, and total; and partial exclusion is a reduction from one share to another. As regards total exclusion, there are six persons who are not subject to it. These are the father, the son, the husband, the mother, the daughter, the wife.[1] As regards all others besides these, the nearer excludes the more remote;[2] and persons who are related through others do not inherit with them, except only the children of the mother, that is, half-brothers or sisters on her side, who are not excluded by her.

One incapable of inheriting has no effect in excluding others.

One who is deprived of any interest in the estate, that is, one incapable of inheriting, as an infidel, a homicide, or a slave, has no effect in excluding others, either partially or totally. But one who is only excluded may exclude others, by general agreement; as, for instance, two or more brothers or sisters, full or half, and on whatever side, who do not inherit when there is a father, but reduce a mother's share from a third to a sixth.

Examples of exclusion.

Full brothers and sisters are excluded by a son, son's son, and a father, and by a grandfather also, with some

[1] In the *M. L. I.*, p. 58, the son is omitted by mistake. Rectified in the 2nd ed., p. 53.

[2] This is true absolutely, as between residuaries. But a nearer residuary does not always exclude a more remote sharer; as, for instance, a mother's mother is not excluded by a father: and a nearer sharer does not exclude a more remote residuary, nor even a more remote sharer, unless there is one cause of succession, as in the case of a mother and grandmother, or a daughter and daughters of a son.—*Shureefeea*, p. 62.

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difference of opinion. Half-brothers and sisters on the father's side are excluded by the same persons, and also by full brothers and sisters; and half-brothers and sisters on the mother's side are excluded by a child, the child of a son, a father, and a grandfather, by general agreement. All grandmothers, whether maternal or paternal, are excluded by a mother; and paternal grandmothers are excluded by a father, as a grandfather is excluded by him, and they are also excluded by a grandfather when anterior to him; but a paternal grandmother is not excluded by a grandfather, because she is not anterior to him. Grandmothers on the side of the mother are not excluded by a father; so that if one should leave a father, a father's mother, and a mother's mother, the father's mother is excluded by the father; but there are different opinions as to the mother's mother, some saying that she has a sixth, and others only the half of a sixth. The nearer excludes the more remote, whether himself an heir or excluded. Thus, if one should leave a father, a father's mother, and the mother of a mother's mother, it is said that the father has the whole, because he excludes his mother, and she excludes the mother of the mother's mother, because she is nearer to the deceased. There is a difference of opinion as to her succeeding with her son, who is paternal uncle to the deceased; but according to the generality of 'our sheikhs,' she does inherit with her son who is the paternal uncle.

Only one maternal grandmother who can be an heir.

It should be remembered that only one grandmother on the side of a mother can be considered an heir, for true grandmothers are only those in whose line of relationship a father does not come between two mothers; so that this single heir is the mother's mother how high soever, and the nearer excludes the more remote, so that only one grandmother can inherit. But of the paternal grandmothers it may be conceived that many may be heirs.

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CHAPTER V.

OF IMPEDIMENTS TO INHERITANCE.

SLAVERY is an impediment to inheritance; and in this respect there is no difference between an absolute and a qualified slave. Even a partially emancipated slave is not capable of inheriting, according to Aboo Huneefa. 1. Slavery.

One who has unlawfully killed another is incapable of inheriting to him, whether the killing was intentional or by misadventure, as by rolling over him in sleep, or by falling on him from the roof of a house, or by treading on him with a beast on which the slayer is riding. But being the indirect cause of a person's death is not a sufficient ground for excluding from his inheritance; as, for instance, when a person has dug a well into which another falls, or placed a stone on the road against which he stumbles and is killed in consequence. Every act of homicide that induces retaliation or expiation is a cause for depriving one of a right of inheritance to the person slain; and anything that does not induce either of these consequences is merely an indirect cause. When a father has circumcised his child, and the child dies in consequence of the operation, the father is not deprived of his right in the child's inheritance. But if he should admonish him by stripes, and the child should die in consequence, he is responsible for the *deeyut* or fine, and loses his right to inherit, according to Aboo Huneefa, though he is not responsible, according to the other two. And if a teacher be the person who punished the child, with the father's permission, he does not incur any liability, according to all their opinions. 2. Homicide.

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3. Difference of religion.

Difference of religion is also an impediment to inheritance; by which is meant the difference between *Islam* and infidelity. But a difference of faith among unbelievers, such as Christianity, Judaism, Mujooseeism, or idolatry, is no impediment to inheritance; so that there are mutual rights of inheritance between Christians and Jews and Mujoosees.

4. Difference of country.

Difference of *dar* or country is also an impediment to inheritance, but this applies only to unbelievers, not to Mussulmans. So that if a *Mooslim* should die in the *dar-ool-hurb*, his son in the *dar-ool-Islam* inherits to him. The difference of country is actual when an alien dies in the *dar-ool-hurb*, having a father or son who is a *zimmee* in the *dar-ool-Islam*; and in that case the *zimmee* does not inherit to the alien. In like manner, if a *zimmee* should die in the *dar-ool-Islam*, having a father or son in the *dar-ool-hurb*, they would not inherit to him. The difference of country is constructive when a *moostamin* dies in 'our' territory, having a *zimmee* heir, or *vice versâ*, and neither is heir to the other. Countries differ by a difference of armies and governments, which cuts off protection between them.[1] When a *moostamin* dies in 'our' territory, leaving property, it should be sent to his heirs; when a *zimmee* dies without heirs, his property goes to the *beit ool mal*, or public treasury.

[1] See further on this subject, *M. L. I.*, 2nd ed., p. 18.

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CHAPTER VI.

OF THE INHERITANCE OF INFIDELS AND SOME OTHER CLASSES OF PERSONS.

SECTION FIRST.

Of Infidels.

The inheritance of infidels is generally regulated in the same way as that of *Mooslims*.

INFIDELS inherit among themselves, for the same causes that *Mooslims* inherit, that is, kindred and marriage. The same person may, also, among them as with *Mooslims*, inherit for two causes; as, for instance, when the deceased has left two cousins, one of whom is also his half-brother by the mother. When the two causes of inheritance are of such a nature that one of them excludes the other, it is only by means of the excluding cause that the person can inherit; but if one of the causes does not exclude the other, he may inherit by means of both.[1] Thus, when a *mujoosee* marries his mother, and she bears him a son, the child is both her son and her grandson, but inherits only as the former, and not as the latter; while if the child were a daughter, she might take a half in her mother's succession as a daughter, and a sixth as the daughter of a son, to make up two thirds; and might also inherit as a daughter from her father, but could not take, in his succession, as his half-sister by the mother, because a sister is excluded by a daughter.

[1] This seems to be a general rule, equally applicable to *Mooslims* as to infidels, though the examples cannot apply to the former.

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Invalid marriage not a ground for inheritance.

Infidels do not inherit by reason of marriages which they (only) account to be lawful; as when a *mujoosee* marries his mother. For an invalid marriage does not induce mutual rights of inheritance among *Mooslims*, and cannot do so among *mujoosees*.[1]

Section Second.

Of Apostates.

Male apostate.

A male apostate cannot inherit to anyone, neither to a *Mooslim* nor to an apostate, because, among other reasons inheritance has respect to religion, and he has none. And it is for this reason that he is not allowed to marry a *Mooslimah*, an original infidel, or an apostate, since marriage also has respect to religion.[2]

Succession to his estate.

When a male apostate is put to death, or dies naturally, or escapes to a foreign country (and is judicially declared to have joined the enemy),[3] all that he had acquired while a *Mooslim* belongs to his heirs. Among these his wife is included, if she is a *Mooslim*, and her *iddut* is unexpired at the time of his death. But if her *iddut* has expired, or if her marriage was never consummated, she has no right to any share in his inheritance. She also loses her right if she apostatizes with him; though, when a husband and wife apostatize together, their marriage still continues. If she should bear a child after their apostasy, and the husband should then die, the child would be entitled to a share in his inheritance if the birth takes place within six months from the day of the husband's apostasy; but if the birth should take place at more than six months from the day of the apostasy, the child would have no right.

Difference between his acquisitions

According to Aboo Huneefa, it is only what an apostate had acquired while he adhered to the faith that can be inherited from him; and all his acquisitions subsequent to

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[1] *Doorr ool Mookhtar*, p. 861, and see *ante*, p. 694.
[2] *Shureefea*, p. 200. [3] *Sirajiyyah*, p. 198.

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his apostasy become *fei*, and are to be placed in the public treasury. According to Aboo Yoosuf and Moohummud, the acquisitions of his apostasy are inherited from him in the same way as what he may have acquired before it; that is, there is no distinction between them, and both alike are divisible among his heirs. before and after apostasy.

A female apostate, like a male apostate, cannot inherit to anyone, because she has no religion.[1] Female apostate.

When a female apostate dies, the right of her husband to take a share in her inheritance depends on the fact of her having apostatized during health, or during sickness. If the apostasy took place when she was in health, he has no right to anything. If it took place when she was sick and she has died while her *iddut* is still unexpired, though by analogy she was no evader, and he could, therefore, have no right to her inheritance, yet, on a liberal construction, she is accounted to be such, and he is allowed to participate. Succession to her estate.

On the death of a female apostate, her whole property is to be divided among her heirs, according to the rules of distribution, whether it was acquired during her adherence to the faith, or after her apostasy.[2]

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[1] *Sirajiyyah* and *Shureefea*, p. 200.

[2] By Act XXI. of 1850 of the Indian Legislature, it is declared that 'So much of any law or usage as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing, or having been excluded from the communion of any religion, or being deprived of caste, shall cease to be enforced as law' in all the courts of the country. This removes the disqualifications of the apostate himself; but his children, if brought up in his new faith, would be still excluded from the inheritance of their Mussulman relatives by mere difference of religion—an objection that is left untouched by the Act; while, apparently, there would be no objection to the relatives inheriting from the apostate or his children, for being no longer of the Mussulman religion, his or their succession could hardly be regulated by Moohummudan law.

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Section Third.

Of a Child in the Womb.

A share must be reserved for it.

A child in the womb inherits; and a share must be reserved for him according to all 'our masters,' which he is entitled to if born alive within two years. This has reference to a posthumous child. But if the child's father be alive, as for instance, if the deceased has left a mother pregnant by another man than his father, and she is delivered of a child at more than six months from the day of his death, the child does not inherit, unless the other heirs acknowledge that his mother was pregnant at that time; because it is possible that he may have been conceived subsequently. But if the child is born at six months, he does inherit.

How much is to be reserved.

A child in the womb may be of those who totally or who partially exclude the other heirs, or who participate with them. If he be a total excluder of all the heirs, as (for instance a son) when the other heirs are brothers or sisters or paternal uncles, the whole of the estate must be reserved to abide the event of his birth. When only some of the heirs are excluded, as when there is a grandmother and a brother, the grandmother's sixth is to be paid to her, and the remainder of the estate reserved. If the child be only a partial excluder, as when there is a husband or a wife besides him, the smaller of the shares to which the party may be entitled is to be paid to him or her, and the remainder to be retained. And when the heirs are persons who are not subject to partial exclusion, as a grandfather or grandmother, their full shares are to be paid to them, and the remainder to be retained. If the child is only a participator with the other heirs, and neither a total nor a partial excluder, as when the deceased has left sons and daughters and a pregnant widow, the share of one son is to be reserved. So Khusaf has reported as the opinion and practice of Aboo Yoosuf, and to the same effect also is the *futwa*.

A still-born child

If the child is born dead he does not inherit, and

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there is no other legal effect or consequence. The signs of life are breathing, making a sound, sneezing, weeping, laughing and motion, as of the eyes or hands. If half of the child is protruded alive and it then dies, it is entitled to inherit, but not if less than half be protruded. When the head is presented, and the breast is protruded while the child is still living, it inherits; but if the feet are presented, regard is to be had to the navel. When a child is born dead it does not inherit as already mentioned, but this is to be understood of a regular delivery; and if violence has been done to the mother, as, for instance, if she has been struck on the belly and has cast her progeny, such progeny is to be regarded as one of the heirs. For the law imposes a liability on the striker, and liability is incurred only for an offence against the living, not against the dead. When therefore we presume the child to have been alive, he is entitled to his share in the inheritance, and the share can be inherited from him, in the same way as the exchange for his life is inherited from him, and that is the fine.

does not inherit.

Section Fourth.

Of Missing Persons, Captives, and Persons Drowned or Burned together.

A person is missing when he has gone away and it is not known where he is, or whether he is dead or alive. Such a person, according to 'our' sheikhs, is to be accounted alive so far as regards his own property, and dead as regards the property of others, until such a time has elapsed that it is inconceivable that he should be still alive, or until his contemporaries are dead; after which he is to be accounted dead with respect to his own property as from the day when such time is completed, or the last of his contemporaries has died, and with respect to the property of others, as if he had died on the day of his being missing.

Missing person.

When a person has died to whom one who is missing is an heir, his share is to be reserved until his state be

When he is an heir,

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a share is to be reserved for him.

determined, on account of the possibility of his being alive; and when the time has arrived which has been above indicated, his own property is to be divided among those of his heirs who are then alive; but what was reserved for him from the estates of other persons is to be returned to the heirs of such persons, as if the missing person had never been.

Captive.

A captive is subject to the same rules as other Mooslims in respect of inheritance unless he renounces his religion, and if he renounces it, he is subject to the same rules as apostates. If it is not known whether he has renounced his religion, or whether he is dead or alive, he is subject to the same rules as missing persons.

Persons perishing together.

Where several persons have been drowned or burnt together, and it is not known which of them died first, 'we' treat them all as having died together. The property of each will accordingly go to his own heirs, and none of them can be heir to another, unless it is known in what order they died, when those who died last will inherit to those who died before them. And the rule is the same when several are killed together by the falling of a wall or in the field of battle, and it is not known which of them died first.

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CHAPTER VII.

OF DISTANT KINDRED.

Definition.

THE distant kindred are all relatives who are neither sharers nor residuaries; and they are like the residuaries insomuch that when there is only one of them he takes the whole property. Of the distant kindred there are four classes. The first comprises the children of daughters and sons' daughters; the second are the false grandfathers and false grandmothers; the third are the daughters of full brothers and of half-brothers by the father, the children of half-brothers by the mother, and the children of all sisters; the fourth are the paternal uncles by the mother (that is, the half-brothers of the father by the same mother) and their children, paternal aunts and their children, maternal uncles and aunts and their children, and the daughters of full paternal uncles and half-paternal uncles by the father. These, and all that are connected with the deceased through them, are his distant kindred.

Four classes.

Order of succession.

The first class of the distant kindred is first in the succession, though the individual claimant should be more remote than one of another class. The second is next; then the third; then the fourth; according to the order of the residuaries. And this has been adopted. Neysabooree has stated in his Book on Inheritance, that none of the second class can inherit, though nearer to the deceased, while there is one of the first, though more remote; and in like manner as to the third with the second, and the fourth with the third. And he has said that this has been approved of for the *futwa*, and acted upon by 'our' sheikhs, who give precedence absolutely

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to the first class over the second, the second over the third, and the third over the fourth. So that the daughter of a daughter, how low soever, is preferred to the mother's father.

Rules of preference among the individuals of each class.

The preference of individuals in the different classes is regulated by the following rules:—1st. The nearer to the deceased is preferred to the more remote. Thus the daughter of a daughter is preferred to the daughter of a daughter's daughter, and a maternal grandfather is preferred to the father of a mother's mother. 2nd. When there is an equality in degree, that is, in proximity to the deceased, the child of an heir, whether sharer or residuary, is preferred. Thus the daughter of a son's daughter is preferred to the son of a daughter's daughter. But this rule is not applicable to the second class, though it applies to all the rest. 3rd. If the claimants are equal in proximity to the deceased, and there is no child of an heir among them, the property is to be equally divided among them, if they are all males or all females; and if there is a mixture of males and females, then in the proportion of two parts for a male and one to a female. This is without any difference of opinion when the sex of the ancestors, whether male or female, is the same. But when the ancestors are of different sexes, though, according to Aboo Yoosuf the division is to be made in the same way, yet, according to Moohummud, it is only the number that is to be taken from the individual claimants, and the quality of sex is to be taken from the generation in which the difference of sex first appears. Thus, if one should leave the son of a daughter and the daughter of a daughter, the property is to be divided among them in the proportion of two shares to the male and one to the female, because here the sex of the ancestors is the same; but if he should leave the daughter of a daughter's daughter, and the daughter of the son of a daughter, the property would be divided between them in halves, according to Aboo Yoosuf, regard being had merely to the number of the individuals; while, according to Moohummud, the property is to be divided between them in thirds, two thirds to the

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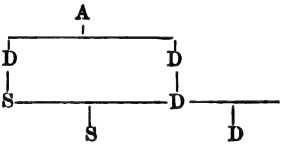
daughter of the son of a daughter, and one third to the daughter of the daughter's daughter. The Imam Asbeejanee has given the preference to the opinion of Aboo Yoosuf, as being of easier application, and the author of the Moheet and the sheikhs of Bookhara have also adopted it in this class of cases. 4th. If one of the claimants is connected with the deceased in two or more ways, he will inherit by each way, regard being had to the branches, according to Aboo Yoosuf, and to the roots, according to Moohummud; except the grandmother, who, according to Aboo Yoosuf, can inherit only in one way. Thus, suppose a man to have left two daughters who have died, one leaving a son and the other a daughter; and suppose this son and daughter to intermarry, and to have a son, after which the daughter marries another man, to whom she bears a daughter,—her first child is thus the son of a daughter's son and also the son of a daughter's daughter, while her second child is only the daughter of a daughter's daughter, according to the scheme in the margin. Now suppose the husband and wife and the grandmothers to be dead, and the question to relate to the estate of the great-grandfather: according to Aboo Yoosuf, the son would take four fifths and the daughter one fifth, that is, a double share as a male, and that doubled by reason of his being connected in two ways. While, according to Moohummud, the son would take five sixths, and the daughter only one sixth; that is, Moohummud would make the division according to sexes in the second generation, where the distinction first appears, giving two thirds or four sixths to the grandson which would pass wholly to his son, and leaving the remaining third or two sixths for the granddaughter, which would be equally divided between her son by the first marriage, and her daughter by the second.[1]



[1] For further details regarding the distant kindred, the reader is referred to the *M. L. I.*, chap. xi., 2nd ed. chap. xii.

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CHAPTER VIII.

OF THE COMPUTATION OF SHARES.

Extractors or divisors of shares.

Of the six appointed shares, a sixth, a third, and two thirds, form one series, and an eighth, a fourth, and a half, form another series; and each one of the shares has an extractor or divisor of its own.[1] Thus, a half is the extractor of two shares, and of each of the remaining shares the name is the extractor, so that eight is the extractor of an eighth; four of a fourth; three of one third and two thirds; and six of a sixth. When there are several shares of the same series, the name of the lowest share is the extractor, and when there are shares of different series, the smallest number divisible by all the shares without a fraction, is the extractor.[2] If four is found in conjunction with all or any of the other series, the extractor is twelve; if eight is found in such conjunction, the extractor is twenty-four; and if two is found in such conjunction, the extractor is six.

How the extractor must be multiplied when there is one class whose share is not divisible without a fraction.

When the shares have been determined, and each share is divisible among the individuals who are entitled to it without a fraction, nothing farther is required. But if there is any share that is not so divisible, multiply the number of individuals who are entitled to it by the extractor, and its increase if it be increased,[3] and the product

[1] That is, a number by which it may be eliminated without a fraction from the amount of the property.

[2] *M. L. I.*, pp. 87, 88, 2nd ed. 59, 60.

[3] The original extractor may be increased, as will be seen in the next chapter: and if so, the increased extractor is to be used in the operation instead of the original.

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will satisfy the case. Thus, the deceased has left a widow and two brothers, and the share of the widow being a fourth, the extractor is four, and there remain three fourths which cannot be divided among two brothers. Accordingly, four is to be multiplied by two, and the estate to be divided into eight parts, which will resolve the case; for the widow taking a fourth of the eight or two parts, the remaining six will be equally divisible among the two brothers. If there is a common measure between the shares, and the number of individuals who are entitled to it, divide the number of individuals by the common measure, and multiply the extractor by the quotient. Thus, there are a widow and six brothers, and the widow taking a fourth, there remain three parts which are not divisible without a fraction among the six brothers. But there is a common measure of both the numbers, and six divided by three gives two, which is accordingly to be multiplied by four, the original extractor, and the product or eight parts will be found to be equally divisible; for the widow taking her fourth or two parts, there remain six for the brothers, or one for each. As another example, take the case of a widow, six full brothers and three full sisters. Here the division is at first into four parts, whereof the widow taking one, there remain three, which cannot be divided into fifteen parts (the number required to allow each brother double the share of each sister), but there is a common measure between three and fifteen, which is three, and fifteen being divided by three, the quotient is five, and the original extractor being multiplied by it, the product, or twenty shares, will resolve the case.

How it is to be multiplied when there are two classes whose shares cannot be divided without a fraction.

When there are two shares which do not admit of being divided without a fraction between the individuals who are entitled to them, first seek for a common measure between each share and the individuals, and then between the numbers of individuals; and if they are *mootumathil* or equal, multiply one of them by the original extractor of the case; if they are *mootudakhil*, or one a multiple or equal part of the other, multiply the greater of the two by the extractor; if they are commensurable multiply the

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lowest term of one by the other, and then multiply the product by the extractor; and if the numbers are *mootubaien* or prime to each other, multiply each by the other, and the product by the original extractor. Thus, take the case of three uncles and three daughters. Here the daughters take two thirds, and the uncles one third, and both the shares are indivisible without a fraction among the persons entitled to it, but the numbers in the two classes are equal; one of them, or three, is accordingly to be multiplied by the extractor which is also three, and the product or nine shares will resolve the case. Or take the case of five grandmothers, five full sisters, and one paternal uncle. Here, the original division is into six parts (one to the grandmothers, four to the full sisters, and one to the uncle); but two of the shares are indivisible among the individuals entitled to them. The individuals, however, are equal; and one of the two numbers, or five, is accordingly to be multiplied by the extractor six, and the product or thirty resolves the case. Again, there are a grandmother, six full sisters, and nine half-sisters by the mother, and the original extractor is six increased to seven, of which the grandmother takes one, the half-sisters by the mother two —the numbers of the shares and of the individuals being incommensurable—and the full sisters take four, but between them and their portions there is the common measure two, which reduces their number to three, and that being an equal part of nine (the number of the half-sisters) nine is to be multiplied by the increased original extractor, and that will give sixty-three, which resolves the case. Again, there is a daughter, six grandmothers, four daughters of a son, and one paternal uncle, and the original extractor is six. Here, there is no common measure of the shares, and the individuals entitled to them; but there is a common measure between individuals and individuals (that is, between six, the number of grandmothers, and four, the number of son's daughters). The common measure is two, and half of one being multiplied by the other, the result is twelve, which, being multiplied by the original extractor,

Example where the numbers of individuals are equal.

Example where the number of one class is a multiple of the number of another.

Examples where the numbers are commensurable.

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gives seventy-two as the number of parts into which the whole is to be divided.

How the extractor is to be multiplied when the shares of three or more classes cannot be divided without a fraction. Examples

When there are three or more shares that do not admit of being divided among the individuals entitled to them without a fraction, a common measure is first to be sought between the shares and the individuals, then between individuals and individuals, and you are to do so as you have done with the two shares in respect of the numbers being equal, commensurable, or incommensurable, or one being a multiple of the other. Thus, take the case of four wives, three grandmothers, and twelve paternal uncles. The extractor being twelve, the widows take a fourth, or three parts between them; the grandmothers a sixth, or two parts, and the uncles the remainder, or seven parts, and there is no common measure between any of the shares and the individuals entitled to it; but the numbers of the three sets of individuals are either multiples or parts of each other. The largest, accordingly, is to be taken, or twelve, and multiplied by twelve, the original extractor of the case, and the product, or one hundred and forty-four, is the number of parts into which the estate is to be divided; and as the widows had three out of twelve, they have now thirty-six between them, or nine to each; and as the grandmothers had two out of twelve, they have now twenty-four, or three to each; and as the uncles had seven out of twelve, they have now eighty-four, or seven each. Again, take the case of six grandmothers, nine daughters, and fifteen paternal uncles: the original extractor being six, the grandmothers have one share which cannot be divided between them without a fraction, and there is no common measure between their number and the share, the daughters have four in the like condition, and the uncles have one also in the like condition; but between the numbers of the individuals there is a common measure, which is three. Take, then, a third of the six grandmothers, or two, and multiply that by the number of daughters, which is nine, and the product will be eighteen. Of this, taking a third,

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or six, multiply it by the number of uncles, which is fifteen, which will give ninety; and this again being multiplied by six, the original extractor, the product, or 540, is the number of parts into which the estate is to be divided.

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CHAPTER IX.

OF THE INCREASE.

THE shares of the sharers may be equal to, or less or more than, the shares of the property.[1] In the first case, they are said to be *ádil*, or just, as when the deceased has left two full sisters and two half-sisters by the mother, and the former take two thirds, and the latter one third; or when the shares of the sharers are less than the shares of the property, but there is a residuary to take what remains. In the second case the shares are said to be *kasir*, or deficient, as when they are less than the shares of the property, and there is no residuary; for instance, where the deceased has left two full sisters and a mother, and the sisters take two thirds, and the mother a sixth, and they also take what remains, because there is no residuary. This is a case of return. In the third case, which is termed *âïl*, or excessive, the shares of the sharers exceed the shares of the property by there being, for instance, two thirds and a half, as in the case of a husband with two full sisters and a mother, or two halves and a third, as in the case of a husband with one full sister and a mother. To a case of this kind the rule of the *awl*, or increase, is applicable, according to the majority of the companions; and it consists in raising the shares of the property to the number of the shares of the sharers, by which means the deficiency is distributed over all the sharers in proportion to their shares. Thus, in the two

The shares may be equal to, or less or more than, a whole number.

When they are in excess the extractor must be increased.

[1] Or, in other words, the sum of the fractions that represent the shares are equal to, or less or more than, an *integer*, or whole number.

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cases above mentioned, where the shares amount to seven sixths and eight sixths respectively, the extractor of the case, or six, is raised to seven and eight respectively, so that the sharers, instead of getting so many sixths of the property, get only so many sevenths in one case, and so many eighths in the other.

Can happen only with the extractors, 6, 12, and 24.

Of the seven extractors, four—or two, three, four, and eight—never increase;[1] but of the remaining three—or six, twelve, and twenty-four—six may increase to ten, and all intervening numbers, both odd and even, twelve may increase to thirteen, fifteen, and seventeen, and twenty-four may increase to twenty-seven. One or two examples of the increase of six may suffice as illustrations of the whole. Thus, there are a grandmother, one full sister, two half-sisters by the mother, and one half-sister by the father, and the division is into six shares, whereof the grandmother has a sixth (one), the full sister a half (three), the half-sister by the mother a third (two), and the half-sister by the father a sixth (one), or seven in all, to which number accordingly the extractor must be raised. Again, there are a husband, a mother, and two full sisters, and the original extractor is six, which must be raised to eight. So, also, where there are a husband, a mother, and three sisters of different kinds, the original extractor, which was six, must be raised to nine, whereof the husband has three, the mother one, the half-sister by the mother one, the full sister three, and the half-sister by the father one, to make up the complement of two-thirds;—all *ninths*, instead of sixths, as they would have been but for the necessity of the increase.[2]

Examples.

[1] Because, in the cases in which they are required, the estate is either equal to or in excess of the shares.—*M. L. I.*, p. 91, 2nd ed., p. 61.

[2] For further examples of the increase, see *M. L. I.*, pp. 62, 63, 64.

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CHAPTER X.

OF THE RETURN.

Definitions.

THE return is the converse of the increase. Where there is no residuary the surplus of the shares of the sharers reverts to them in proportion to their shares, with the exception of the husband and wife. All the persons to whom there may be a return are thus seven in number, the mother, the grandmother, the daughter, son's daughter, full sister, half-sister by the father, and half-brother or sister by the mother; and a return may take place to one, two, or three classes of sharers, but not to more. The numbers to which extractors may be reduced by means of the return are four, that is, two, three, four, and five.

When all the sharers participate in the return.

When all the sharers are persons to whom a return may be made, the surplus drops, and the extractor is reduced to the aggregate of the shares.[1] As an example take the following cases. 1. Example of a reduction to two. A grandmother and a half-sister by the mother. Here, each of the parties is entitled to one sixth, and the remainder reverts to them in proportion to their shares. The original division of the case, which was into six parts, is thus reduced to two, and each party takes a half. 2. Example of a reduction to three. A grandmother and two half-sisters by the mother. Here the grandmother has one share out of six (the original of the case), and the sisters two shares, so that the division is reduced to three. 3. Example of a reduction to four. A daughter and a mother. The daughter takes a half, or three out of six (the original of

[1] See *M. L. I.*, p. 115, 2nd ed., 79.

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the case), and the mother a sixth, or one out of six, and the division is into four. 4. Example of a reduction to five. Four daughters and a mother (the daughters being entitled to two thirds, or four sixths, and the mother to one-sixth), the original division which was into six parts is reduced to five.

When there is a sharer who cannot participate, and only one class of sharers who can.

When the case comprehends a person who cannot participate in the return, as a husband or wife, and the persons who can participate are all one class, give the person who cannot participate his or her share by means of the lowest extractor of the case, and then divide the remainder according to the number of individuals if it can be done without a fraction. Thus, in the case of a husband and three daughters, give the husband his share, which is a fourth, that is one out of four, and the daughters the remaining three. If the division cannot be made without a fraction, but there is a common measure between the number of the remaining shares and the number of the individuals entitled to participate in them, take the quotient of the individuals (divided by the common measure), and multiply it by the extractor of the share of the person who does not participate. As, for instance, where there is a husband and six daughters, the husband has one fourth, and the daughters the remaining three, which cannot be divided between them without a fraction. There is, however, a common measure (three) between them, and dividing the number of individuals by it, the quotient is two, which being multiplied by the extractor of the share of the person not entitled to participate, which is four, gives eight as the number of shares into which the estate is to be divided; whereof the husband's fourth being two shares, there remain six which are equally divisible among the daughters. If there is no common measure, as in the case of a husband and five daughters, the whole number of heads, which is five, is to be multiplied by the extractor of the share of the person who cannot participate, which is four, and the result is twenty, which satisfies the case.

When with one

If with the person who does not participate in the re-

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turn, there are two or three classes of persons who do participate, first give the former his or her share, and then divide the remaining parcels among those who do participate, if divisible without a fraction. If not, multiply the whole of the shares of those who can participate by the extractor of the share of the person who cannot, and the result will satisfy the case; then multiply the share of the person that does not participate by the extractor of those that do participate, and the shares of those that do participate by what remains, after extracting the share of the person who does not participate. Example of the first :— A wife, a grandmother, and two half-sisters by the mother. The wife takes a fourth, and there remain three shares which are divisible among those who participate; that is, one-third to the grandmother, and two-thirds to the half-sisters, and there is no fraction. Example of the second :— Four wives, nine daughters, and six grandmothers. The wives take an eighth, or one share, and there remain seven shares, which are reduced by the return to five, and these cannot be divided without a fraction, neither is there any common measure. The shares of the return, which are five, are accordingly to be multiplied by the extractor of the share of the person who does not participate, or eight, and the product is forty, which will satisfy the case. Then multiply the share of the person that does not participate, which was one (eighth), by the extractor of those who do participate, which is five, and the product or five (that is five fortieths) is the share of the wives, and multiply the extractor of those who do participate, which is five, by what remains after deducting the share of the person who does not participate, which is seven, and the product is thirty-five, of which the daughters have four fifths or twenty-eight, and the grandmothers one fifth or seven.[1]

who cannot, there are two or more classes who can participate.

[1] For further details, see *M. L. I.*, 2nd ed., chap. xi.

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CHAPTER XI.

OF VESTED INHERITANCES.[1]

When the heirs of a deceased heir are the same as the original heirs, one partition suffices.

WHEN one of the heirs of a deceased person has died before a partition of his property has been made, and the heirs of the second deceased are the same persons who are heirs of the first deceased, one partition will suffice for both cases. Thus, when the heirs are sons and daughters, and one of either of them dies, he or she has no other heirs than the surviving brothers and sisters, and the property is divided among the survivors in the proportion of two shares to a male and one to a female.

Rule of partition when they are different, but the deceased's share is divisible without a fraction.

When among the heirs of the second deceased there are persons who are not heirs of the first deceased, the estate of the first deceased is to be divided, to ascertain the share of the second deceased, and then the estate of the second deceased is to be divided amongst his heirs; and if his share can be divided amongst them without a fraction, there is no necessity for any further operation. Thus, when the heirs of the first deceased are a son and a daughter, and the son dies before a partition, leaving a daughter and his sister, the estate of the first deceased is to be divided into three parts, whereof two being the portion of the son, a half (or one of them) goes to his daughter, and his sister takes the rest.

Rule when it is not so divisible, but there is a common measure.

If the share of the second deceased is not divisible without a fraction among his heirs, but there is a common measure between the share and the parcels into which it is divisible, reduce both to their lowest terms, and multiply

[1] *Moonasukhut*—means, literally, the transfer, by the death of an heir, of his share in the inheritance to another.—FREYTAG.

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the number of parcels in the first estate by the lowest term of the number of parcels in the second, and the product will resolve the case. Then, in order to ascertain the share of each one of the heirs of the first deceased multiply his share in that estate by the lowest term of the parcels in the second; and to ascertain the shares of each one of the heirs of the second deceased, multiply his original share in it by the lowest term of the share of the second deceased in the estate of the first deceased. Thus, a person dies leaving a son and a daughter, and before a partition is made of his property the son dies, leaving a widow, a daughter, and three grandsons (son's sons): the estate of the first deceased is divisible into three parts, whereof two, or the son's share, must be divided into eight parcels, of which his widow has an eighth, or one parcel; his daughter a half, or four parcels; and his grandsons the remaining three. But two cannot be divided into eight parts without a fraction. There is, however, a common measure, two, between them; and reducing each to their lowest terms, the result is one and four. Now multiply the parcels of the estate of the first deceased, or three, by the lowest term of the parcels of the estate of the second deceased, or four, and the product will be twelve, which will resolve the case. To ascertain the son's share in the estate of the first deceased, multiply his original share, which was two, by the lowest term of the parcels of the second estate, which was four, and the product, or eight, is his share out of twelve. And following the same course for the daughter's share, it is found to be four parcels out of twelve. To ascertain the widow's share, which is an eighth or one, multiply that by the lowest term of the second deceased's share in the estate of the first deceased, which is one also, and her share is one out of twelve parcels. And following the same course with the daughter and the grandsons respectively, her share is found to be four, and theirs three, or one to each.

Rule when there is no common measure.

If there is no common measure between the share of the second deceased in the estate of the first and the parcels into which the share must be divided, multiply

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the number of parcels of the first estate by the number of parcels in the second, and the product will satisfy the case. Then, to ascertain the portion of each one of the heirs of the first deceased, multiply his original share by the number of parcels in the second estate; and to ascertain the portion of each one of the heirs of the second deceased, multiply his original share by the share of the second deceased in the estate of the first. Thus, a person dies leaving a son and a daughter, and before a partition of the estate is effected, the son dies, leaving a son and a daughter. Here the first estate is divisible into three portions, whereof the son's share is two, but he dies, and his estate is also divisible into three portions. Three is accordingly to be multiplied by three, and the product, nine, will satisfy the case. Then to ascertain the son's portion in the estate of the first, multiply his original portion, or two, by the number of parcels in his own estate, or three, and the product, or six, is his portion. In like manner, to ascertain his son's portion, multiply his original share in the second estate, which is two, by his father's share in the first, which was two also, and the result is four. And following the same course for his daughter's portion, it is found to be two.

In like manner, if any of the heirs of the second deceased should die before the partition of his estate among his heirs, it is to be divided in the same way as has been explained.

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CHAPTER XII.

OF THE DISTRIBUTION OF ASSETS.

General rule.

When the estate is *dirhems*, or *deenars*, and you wish to divide it according to the shares of the heirs, multiply the share of each heir by the amount of the estate, and divide the product by the number of parcels into which the estate is divisible. If there is a common measure between the amount of the estate and the number of parcels, multiply the share of each heir by the lowest term of the estate, then divide it by the lowest term of the extractor; and this will bring out the share of the heir. In the same way you may find the share of each class. If you desire to prove the operation, add up the items, and compare the sum with the amount of the estate, and if they are equal the work is right; if not, there is some error, and you must do the work over again, and rectify the error (D.V.). As an example, take the case of a husband, a half-sister by the father, and a half-sister by the mother. The extractor is six increased to seven, and suppose the amount of the estate to be fifty *deenars*: then multiply the husband's share, which is three, by fifty, the amount of the estate, and the product is 150, which divide by seven, and the result is $21\frac{3}{7}$. The share of the half-sister by the father is the same. And the half-sister by the mother has one share, which, being multiplied by fifty and divided by seven, gives $7\frac{1}{7}$.[1] When all are added up, it will be found that they make fifty.

[1] Or as 7 : 50 :: 3 : $21\frac{3}{7}$, and 7 : 50 :: 1 : $7\frac{1}{7}$.

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Case of a composition.

When a creditor or heir has entered into a composition for some part of the estate, treat that part as if it were not in existence, and then divide the remainder according to the shares of the remaining heirs. Thus, when the heirs are a husband, a mother, and a paternal uncle, and the husband compounds his share of the estate for what is due by him of the dower, treat the debt as if it did not exist, and divide the remainder according to the shares of the remaining heirs, that is, by giving two thirds to the mother, and the rest to the uncle.

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CHAPTER XIII.

OF 'MOOLUKKUBAT' OR TITLED CASES.

THE MUSHRUKAH.—This was the case of a husband, a mother, two children of the mother, and full brothers and sisters. The husband took a half, the mother a sixth, the children of the mother a third, and the rest were excluded. So, also, if, instead of a mother, there were a grandmother. Such was the opinion of Aboobekr and Ibn Abbas, and it is the doctrine of 'our masters.' But Ibn Musood and Zeyd, the son of Thabit, have said that the residuary among the full brothers should participate with the children of the mother in their third. Such also was the last opinion of Omar. He had decided, in the first instance, according to 'our doctrine;' but on one of the full brothers saying to him, 'O Commander of the Faithful, grant that our father was an ass, still we had one mother,' he directed a participation with them, saying, 'This was what we intended by our decision.' The case has accordingly been called *mushrukah*, because Omar made a participation between them; and it has also been termed *himariyyah* (from *himar*, an ass), because of the brothers saying, 'Grant that our father was an ass.'

THE KHURKA.—This was the case of a mother, a grandfather, and a sister, and it has been so named because the various opinions of the companions have in a manner torn it. Aboobekr has said that the mother should take a third and the grandfather the remainder;[1] Zeyd that the mother

[1] This is agreeable to the doctrine of Aboo Huneefa, according to whom, a true grandfather comes into the stead of a father when there is none. See *ante*, p. 697.

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should take a third, and that the remainder is between the others in thirds; Aly, the mother a third, the sister a half, and the grandfather the residue. There are two reports of Ibn Abbas' opinion, with one of which Omar agreed, and it was to the effect that the sister should have a half, the mother a third, and the grandfather the residue. While Othman was alone in the opinion that the mother should have a third, and the remainder be equally divided between the grandfather and sister. There were thus in all six different opinions on the case.

THE MERWANIYAH.—This was a case of six sisters of different kinds and a husband. The husband took a half, the full-sisters two thirds, the half-sister by the mother a third, and the half-sister by the father fell out altogether, the original extractor, which was six, being increased to nine. The case obtained its name from Merwan, the son of Hookum, in whose time it occurred.

THE HUMZIYAH.—This was a case of three grandmothers on both sides, a grandfather, and three sisters of different kinds; and, according to Aboobekr and Ibn Abbas, the grandmothers should have a sixth, and the grandfather the remainder. But, according to Aly, the full sister should have a half, the half-sister by the father a sixth to make up two-thirds, the grandmothers a sixth, and the grandfather a sixth; while, according to Zeyd, the grandmother should have a sixth, and the remainder be divided between the grandfather, the full sisters, and the half-sister by the father. The case obtained its name from Humza, who, being questioned regarding it, gave these answers.

THE DEENARIYAH.—This was the case of a wife, a grandmother, two daughters, twelve brothers, and one full sister and the estate to be divided between them was 600 *deenars*, of these the grandmother took a sixth or 100 *deenars*, the two daughters two thirds or 400, and the wife an eighth or 75, leaving 25 *deenars*, of which each brother had two, and the sister one. The case is also termed Daoodiya from Daood-ood-Tai, who pronounced the decision. On the sister complaining to Aboo Huneefa that her brother had left an estate of 600 *deenars*, of which she had received

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only one *deenar*, he asked her who had given the decision, and, on her answering, 'Your disciple Daood-ood-Tai,' showed her, by repeated questions as to the other heirs left by her brother, to which she replied to the effect before mentioned, that he had done her no wrong, and that she was only entitled to one *deenar*.

THE IMTIHAN.—This was a case of four wives, five grandmothers, seven daughters, and nine half-sisters by the father. The original division being into twenty-four parts, the wives take an eighth or three, the grandmothers a sixth or four, the daughters two thirds or sixteen, and the sisters the single share that remains; and since there is no common measure between the shares and the persons entitled to them, all the numbers of the latter are to be multiplied together, and the product by twenty-four. The result is 30,240, thus:—$4 \times 5 \times 7 \times 9 \times 24 = 30{,}240$. The reason of the *Imtihan* (which literally means 'trying or making an experiment') is that it can be said, a man left heirs of different kinds, the numbers of each kind being less than six, yet that the case cannot be resolved by any number under thirty thousand.

THE MAMOONIYA.—This was a case of two parents and two daughters, but one of them died, and left whom she did leave. Al Mamoon, intending to appoint a judge of Bussorah, summoned Yahya Ibn Aktum before him, of whom he had a low opinion, and put the question to him (how the estate should be divided), to which he answered, 'O Commander of the Faithful! tell me whether the deceased was a male or a female;' whereupon Al Mamoon, perceiving that he understood the question, appointed him to the office. The answer varies according as the first deceased was male or female. If a male, the division of the property must be into six parts, whereof the two daughters would have two thirds, and the parents two sixths. But when one of the daughters died, she would have left a sister, a true grandfather—a father's father—and a true grandmother—a father's mother. The grandmother would accordingly take a sixth, and the grandfather the remainder, the sister falling out altogether, according to Aboobekr, but ac-

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cording to Zeyd, the grandmother would have a sixth, and the remainder be between the grandfather and sister in thirds. If, again, the first deceased were a female, the daughter would have left at her decease a sister, true grandmother – mother's mother,—and a false grandfather —mother's father,—and the grandmother would take a sixth, the sister a half, and the remainder returned to them, the false grandfather falling out altogether.

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BOOK XII.

OF CLAIMS AND JUDICIAL PROCEEDINGS.

CHAPTER I.

DEFINITION, CONSTITUTION, CONDITIONS, LEGAL EFFECT, AND KINDS OF CLAIMS; AND HOW TO DISTINGUISH BETWEEN THE CLAIMANT AND THE DEFENDANT.[1]

Definition and constitution. Conditions.

THE legal definition, which is also the pillar of claim, is the ascribing of a thing to one's self, at a time that it is disputed: as by saying, 'This thing is mine.' Among the conditions of its legality are the following:—1st. Understanding on the part of claimant and defendant; and the claim of an insane person or a boy without understanding is not valid, insomuch that the defendant is not bound to answer, nor can proof be heard. 2nd. The presence of an adversary; insomuch that a claim and proof cannot be heard except against a present defendant. 3rd. That the subject of the claim is something known.[2] 4th. That the claim is preferred at the sitting of the judge. 5th. That it is made orally by the claimant himself, unless he has some good excuse, or the defendant consents that it be made by another on his behalf. This was the opinion of Aboo Huneefa; but, according to the two disciples, the claimant may employ an agent in all cases, without any special ex-

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[1] *Fut. Al.*, vol. iv., p. 1.

[2] Some illustrations of this condition will be found in the beginning of the next chapter.

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cuse for so doing, or the consent of the opposite party. And if the claimant is nervous he may write his claim, and make it from the written statement. If his language is different from that of the judge, he may employ an interpreter. 6th. There must be no contradiction in the claim, except in cases of paternity and freedom; by which is to be understood, that the claimant has not advanced anything before that is inconsistent with his claim; as, for instance, if he had acknowledged a thing to be the property of the defendant, he cannot afterwards claim it by virtue of a previous purchase.[1] 7th. That the subject of claim be susceptible of proof; so that if one should say, 'Thou art my son,' to a person whose age did not admit of his being so, the claim could not be heard.

Legal effect.

The legal effect of a claim is to entitle the claimant to an answer from the defendant by 'yea' or 'nay.' If he acknowledges the claim, it is established. If he denies it, the judge should say to the claimant, 'Have you proof?' And if he answers, 'No,' the judge is then to say, 'You are entitled to his oath.' If the defendant is silent, neither answering 'yea' nor 'nay,' the judge should treat him as having denied; so that if the claimant should adduce his proof, it is to be heard.

Kinds of claim.

There are two kinds of claim: one valid, and the other invalid; the former being that which has the legal effect above mentioned, and the latter being that which has no such effect.

Distinction be-

To distinguish the claimant (*moodei*) from the defendant (*mooda-âlehi*; literally, claimed against), the former

[1] For an illustration of this condition see *post*, p. 742. When a person in possession of property makes an acknowledgment that it does not belong to him, he is not prevented, on the ground of inconsistency, from subsequently maintaining that it is his, if there were no dispute regarding the property at the time of the acknowledgment. But if there were a dispute regarding it at that time, it is doubtful whether the acknowledgment might not have that effect. And if a person out of possession of property should acknowledge that it is not his, he is so far barred from subsequently suing for it, that evidence of the acknowledgment would be an avoidance of his claim. —*Fut. Al.*, vol. iv., p. 87.

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tween claimant and defendant.

has been defined to be 'one who cannot be forced to litigate if he refuses;' and the latter, 'one who can be forced to litigate though he refuse.' This is the definition given in the Book.[1] Others have said that the *moodei* is one who has no right without *hoojjut* or proof;[2] and the *mooda-âlehi* is one who is entitled, on his own assertion, without proof, as a person in possession; while others have said that the former is 'one who insists for what is not *zahir* or apparent;' and the latter 'one who insists for what is *zahir* or apparent.'[3] And Moohummud has said in the Asul that the *mooda-âlehi* is the denier (*moonkir*), which is correct.[4] But to distinguish who it is that denies, and which of the parties is entitled to the preference in this respect,[5] is a matter for legal determination, with reference more to meaning or reality than to form. Thus, when the trustee of a deposit says, 'I returned it,' his word and oath are entitled to preference, because he denies responsibility, though, in form, he is a claimant, or *moodei*, as to the fact of restitution.[6]

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[1] That is, the *Koodooree.—Inayah*, vol. iii., p. 519.

[2] Viz., by *buyyunut* (witnesses) or acknowledgment, as one out of possession.—*Ibid.*

[3] As when a person claims a debt for some reason against another, the burden of proof is on the *moodei*, because he claims on what is an accident or new occurrence, namely, that another should be involved in liability for a right belonging to him, which is opposed to the *zahir* or apparent: while the defendant is the one who denies because he holds to the original condition, that is, freedom from responsibility, which is *zahir* or apparent.—*Kifayah*, vol. iii., p. 479.

[4] Because the Prophet has said, 'The proof is on the *moodei*, and the oath on the denier.'—*Inayah*, vol. iii., p. 519.

[5] That is, when the form presents two faces (*ibid.*); as in the case which follows in the text, where the answer, though affirmative, denies responsibility.

[6] And if he adduces evidence to the fact, his evidence must be received; so that when he has evidence, regard is to be had to the form, and when he is weak in this respect, regard is to be had to the meaning. (*Ibid.*) The authority of the text is the *Hidayah*; but it is imperfectly stated in the *Futawa Alumgeree*, and I have given it at length from the original, vol. iii., p. 479, with comments in the foot-notes from the *Inayah* and the *Kifayah*.

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CHAPTER II.

OF WHAT IS NECESSARY TO THE VALIDITY OF A CLAIM.

What is necessary; 1st. When the claim is for debt.

If the claim be for debt, it is not valid without an explanation of the quantity, genus, and quality of the commodity which is said to be due. Thus, if it is something that is estimated by measure of capacity, the claimant must mention its genus, as wheat or barley, for instance; and if wheat its kind, as *khureefee* or *rubee* (or of the autumnal or spring crops); its quality, as red or white, and good, medium, or inferior; and its quantity, as so many *kufeez*[1] of such a description. Some cause of liability must also be assigned. So that if one should sue for ten *kufeez* of wheat as being due to him, without assigning any cause, the claim cannot be heard. So, also, if the suit be for any property by reason of an account between the parties, because an account is no cause of liability. And if the cause be complicated, the conditions necessary to its validity should be mentioned, as in the case of a *sulum* sale;[2] for where a cause has many conditions, an enumeration of them all is necessary to the validity of a claim, according to the generality of 'our' sheikhs; but if the conditions are not many, it is sufficient to say, 'for a valid cause,' as, in the case of an ordinary sale, to say, 'for a valid sale.' In the case of a *kurz*, or loan for consumption, it is necessary to mention that the borrower took possession of it, and expended it on himself, for this is necessary to render him liable for it; and also that it was lent out of the lender's own property.

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[1] A measure of about 19 lbs.

[2] For its conditions see *M. L. S.*, p. 257.

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2nd. When it is for a specific moveable.

If the claim be for a specific moveable which is produced at the sitting of the judge, the claimant should point it out with his hand, and say, 'This thing is mine.' If the thing is in the hands of the defendant, he must produce it, that it may be pointed out by the claimant; and if it cannot be produced, as, for instance, if it be a heap of grain, or a flock of sheep or goats, the judge should go himself to the place, or, if within his power to delegate his authority, he should appoint a substitute for the purpose. When a person claims a specific thing in the hands of another, and desires its production at the sitting of the judge, but the other denies its possession, and the claimant then adduces two witnesses to the fact that the thing was in his possession a year before, the evidence is to be received, and the defendant to be compelled to produce the thing. If the thing is absent, and the claimant does not know where it is, as, for instance, if the claim be that the defendant usurped a garment from the claimant, and he does not know whether the subject of claim be in existence or not, he should explain its genus, quality, and value, and his claim will be heard, and evidence received. When a person sues for several things of different kinds and qualities, mentioning one sum as the value of the whole, the claim is valid without any specification of the value of each particular article.

3rd. When it is for *akár*, or immoveable property.

If the claim be for *akár*, or anything that is immoveable, its four boundaries and the names and lineage of their proprietors must be explained. The lineage must include the grandfather's name, according to Aboo Huneefa, whose opinion is correct; except that when the parties are well known, the names of even their fathers are not required. The city, sub-district (*muhullah*), and street where the property is situated, should also be mentioned; and the mention of its being in the possession of the defendant, and that the claimant demands it of him, is likewise necessary; because by possession he becomes a fitting adversary,[1] and demand excludes the idea of his having

[1] *Doorr ool Mookhtar*, p. 577.

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any right to retain the property, as by mortgage, or lien for the price. But it is not sufficient that the property should be declared to be in the defendant's possession, and that both claimant and defendant should agree upon this point, unless the possession is established by witnesses or known to the judge, from a suspicion that the *akár* may possibly be in the possession of a third party;—contrary to the case of moveable property, the possession of which is a matter of ocular demonstration.[1] If only the boundaries on three sides are mentioned, nothing being said about the fourth, there is no harm; but if silence be not observed, and a mistake is made in describing the boundary, the claim is not valid.

A claim to *akár* may be objected to on the ground of inconsistency, if the claimant had seen its sale to another, and remained silent.

A man sells *akár*, his son and his wife and some of his near relatives being present, and knowing the delivery to the purchaser, and his enjoyment thereof for a time, after which, one of those who was present at the sale claims, as against the purchaser, that the mansion is his property, and was not the property of the seller at the time that he sold it:—The moderns are agreed, and some of the sheikhs of Samarkand have also said that such a claim is not valid;—thus treating the silence of the parties as a cancellation of their right by virtue of an implied acknowledgment that it was the seller's property: but the sheikhs of Bookhara have decided in favour of the validity of such a claim.[2] Sudur-Ash-Shuheed has said that the *mooftee* should have regard to the subject of sale, and decree as may appear to be most cautious and best, and if he cannot do so, he should decide according to the opinion of the sheikhs of Bookhara. But if a person, who was present at a sale, should come to the purchaser to demand the price, being sent by the seller, a subsequent claim by him that the property was his own, could not be heard, his demand of the price being tantamount to an allowance of the sale.

[1] *Hidayah*, vol. iii., p. 481.

[2] Though the moderns are said to be agreed that the claim is not valid, the other opinion seems to be more consistent with what is stated in the note on p. 738.

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A mere acknowledgment is not sufficient ground for a claim to a specific thing or a debt.

If a person should claim a specific thing in the hands of another, saying that it is his, because the person in possession acknowledged it to be his, or should sue a person for a thousand *dirhems*, saying in his claim, 'I am entitled to a thousand *dirhems* from him, because he acknowledged them to belong to me;' or if he should begin by saying, 'This man has acknowledged that this thing is mine,' or 'has acknowledged that there is due to me by him such a sum of *dirhems*,' the claim would not be valid according to all 'our' sheikhs. But all are agreed that if he should say, 'This specific thing is my property, and so the person in possession has acknowledged,' or, 'He owes me so and so, and the defendant has acknowledged it,' the claim would be valid, and evidence be received to the acknowledgment. In such a case, if there should be a denial, would the defendant be sworn as to his acknowledgment? He would not be sworn as to his having acknowledged, but as to his being owner of the property. And as a suit for property is not valid if brought by reason of an acknowledgment, so neither is a claim of marriage valid on that ground. But if the claimant should say in his suit that the party in possession said, 'This thing is thine,' the claim would be heard, because that would be a claim for a gift, and gift is a valid cause of property. There is some difference of opinion among 'our' doctors as to the validity of a plea of acknowledgment; that is, whether, if the defendant should adduce evidence that the claimant acknowledged he had no right to the matter in dispute, and that it is the right of the defendant, the evidence could be received. But the generality of them have said that a plea of acknowledgment is valid.

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CHAPTER III.

OF THE 'YUMEEN,' OR OATH.

Definition.

THE word *yumeen* means strength, or power, and is to be understood in this place as a strengthening of the defendant's denial, by means of which he is enabled to get rid of the claim for the present. Its pillar is the mention of God's name in connection with an affirmation. Its condition, a denial by the proper denier; and its legal effect, a cutting off of the contest, so that the claim cannot again be heard when there is no proof.[1]

Can be demanded only in a valid claim.

An oath can be demanded only in the case of a valid claim. And when a claim is valid, the defendant is to be asked regarding it; and if he acknowledge, or if he deny and the claimant proves his case, judgment is to be given against him; and if not,—that is, if he deny and the case is not proved,—he is to be sworn at the claimant's requisition. If he swear, at the call of the claimant, in the presence of the judge, but without being called upon by him to swear, this is not a proper *tuhleef*, or putting of the oath, for *tuhleef* is a right of the judge.

Refusal.

If the defendant should refuse to swear, the judge is to decree against him on the ground of his refusal, according to 'us.' But the refusal must be made at a sitting of the judge. And the judge should say to him, 'I present the oath to you three times; if you swear, well; if not, I will decree against you for what is claimed;' and when the oath has been thus presented to him three times, and he

[1] From this and the definition it would seem that the oath is not conclusive of the claim, as it seems to have been in the Roman law.

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refuses, decree is to be passed against him on the ground of his refusal. This repetition, it has been said, is for greater caution, and that, according to 'our' sect, if the judge should pronounce his decree after one presentment of the oath, it would be lawful; and this is correct; but the first course is preferable. The refusal to swear may be actual, as by saying, 'I will not swear;' or implied, as by remaining silent, when the silence is not induced by any calamity.

Form.

When the oath is presented to a party, the judge is to swear him 'by God,' and is not to swear him otherwise than 'by God.' If the claimant should desire that he be sworn by 'repudiation,' or by 'emancipation,' the judge should not assent, according to the Zahir Rewayut; because to swear by these, or the like, is unlawful.

Terms of the oath when the claim is absolute.

When the claim is for a debt, and no mention is made of a cause, the oath is to be put as to the *hasil*, or result, without mentioning a cause, in the following manner: 'By God, this property which he has claimed is not due by you, and it is so and so, nor is any part of it due.' And in like manner, when the claim is to the ownership of, or a right in, a specific thing produced, without any mention of a cause, the defendant is to be sworn as to the result, saying, 'By God, this specific thing does not pertain, nor any part of it, to such an one, the son of such an one.'

When it is for a special cause.

And if a debt is claimed on the ground of a loan or purchase, or property is claimed on the ground of a sale or gift, or deposit, the defendant is still to be sworn as to the result, according to the Zahir Rewayut, and not as to the cause, whether the defendant objects to the form or not. Thus, in all the cases except deposit, he is to be sworn in these terms,—'By God, there is not due to him against you this property which he claims, or any part of it;' and in the case of the deposit, he is to be sworn,—'By God, there is not in your hands this deposit which he claims, nor any part of it, and he has no right in it against you.' The oath is to be taken in this form, because though the deposit may not be in his hands, yet he may have destroyed or stolen it, which would make him responsible for it. It is a

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principle with Aboo Huneefa and Moohummud, that the oath is to be put as to the result, whenever the cause is removed or negatived by the denial of the result; but when this is not the case, as, for instance, when a woman, absolutely divorced, sues her husband for maintenance (during her *iddut*), and he is one of those who does not admit any liability in such circumstances; or when a person claims a right of pre-emption, on the ground of neighbourhood, and the defendant is one of those who do not recognize this as a ground of such right (by reason of his being a follower of Shafei), the oath is to be put as to the cause, according to all opinions. According to Aboo Yoosuf and Moohummud (by another report than the Zahir Rewayut), when the claim is for property absolutely the defendant is to be sworn as to the property; but if it is claimed for a cause, the oath is to be as to the property with reference to the cause; as, 'By God, I did not borrow from him this property,' or 'By God, I did not usurp from him this property,' or the like, unless the defendant objects, by saying, 'Do not swear me in this manner.' And this opinion has been adopted by some of 'our' sheikhs. But Hulwaee has said that regard is to be had to the defendant's answer and to the claim; and if the defendant should have answered, 'I did not borrow anything from him,' or 'did not usurp anything from him,' he is to be sworn as to the cause, thus,—'By God, I did not borrow;' but if the defendant said, in his answer, 'This property which he claims is not due by me, nor any part of it,' he is to be sworn as to the result,—'By God, it is not due to him by me.' And he said, that 'this of all the opinions, is best, in my estimation;' and most of 'our' judges concur in this view.

When the claim is for marriage.

In a claim for marriage the oath is in this form, 'There is not between you a subsisting marriage at present.' When a woman claims marriage and dower, the man is, according to the two as reported in the Zahir Rewayut, to be sworn to the result, 'By God, this is not thy wife by this marriage which she claims, and she has no right to this dower which she has claimed, which is so and so, nor

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to any part of it,' and if the man be the claimant, the woman is to be sworn, 'By God, this is not thy husband as he claims.' When a woman claims against her husband that he repudiated her once revocably, he is to be sworn, 'By God, she is not repudiated at present by you;' and if the claim is for an absolute divorce, the oath should be, 'By God, she is not at present repudiated by you absolutely,' or 'three times,' according to her claim, or 'By God, you have not repudiated her absolutely or three times in this marriage;' and it should not be, 'You have not repudiated her three times absolutely.' If the wife claims that she asked of him to divorce her, and that he said, 'Thy business is in thy hand,' and that she then exercised the option given to her by choosing herself; but the husband denies both the *amr* and her exercise of the choice, he is not to be sworn as to the result by all opinions, and the oath is to be put to him as to the cause, thus, 'By God, you have not given her the *amr bu yud* since you married her, after she had asked for divorce, and you do not know that she has exercised the choice committed to her at the meeting when it was committed.'

When it is for divorce.

Of Mutual Oaths.[1]

When there is a difference between a buyer and seller regarding the amount of the price, or the quantity of the thing sold, or a difference between a husband and wife regarding the amount of the dower, and only one of the parties adduces evidence, judgment is to be given for the party by whom the evidence is adduced. When they both adduce evidence, the preference is to be given to the evidence which establishes the larger amount.[2] When there is a disagreement both as to the price and the quantity of the thing sold, the seller demanding a larger price than is admitted by the buyer, and the buyer demanding

Cases of difference between seller and buyer when both parties are to be sworn.

[1] Arab *Tuhaloof.*—*Fut. Al.*, vol. iv., p. 43.

[2] This requires some qualification in the case of dower. See *ante*, p. 131.

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a larger quantity of goods than is admitted by the seller; the evidence of the seller is to be preferred as regards the price, and the evidence of the buyer as regards the quantity of goods; and if neither of them can adduce evidence, each should be called upon to accept what is admitted by the other, or to cancel the sale. If they decline these terms of settlement, the judge should swear each to the claim of the other, and the oath of the seller should be in these terms, 'By God, I did not sell it for one thousand,' while that of the buyer should be in these, 'By God, I did not buy it for two thousand.' If they both swear, the judge should cancel the sale, on the demand of both or either of the parties; and if one of them should decline the oath, the claim of the other is to be made binding upon him.

Cases of difference between seller and buyer when there is no mutual swearing.

There is no mutual swearing between the parties to a sale, when the disagreememt has reference to a delay in the delivery of the subject of sale, or of the payment of the price, and whether it be as to there being any delay, or as to the term of it. Neither is there any such swearing when the difference is as to an option, or the receipt of the price, or the delivery of the thing sold, or as to an abatement from the price, or a release, or the place of delivery. In all these cases, the denier only is to be sworn. So also when the difference is as to the fact of sale, the word of the denier is to be preferred. But when the difference has regard to the kind of contract, one of the parties saying it was a sale, and the other that it was a gift, or to the kind of price, one saying it was *dirhems* and the other *deenars*, both parties are to be sworn, according to Moohummud, whose opinion is correct.

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CHAPTER IV.[1]

OF THE 'DUFA' OR AVOIDANCE.[2]

An avoidance of the contest is valid if supported by evidence.

WHEN a person sues for a slave in the possession of another, and the possessor says, 'He belongs to such an one who is absent, and has left him in deposit with me,' or 'in loan,' or 'on hire,' or 'in pledge,' or 'from whom I have usurped him,' and adduces evidence of the fact, or that the claimant acknowledged the slave to be the property of such an one, the suit is averted from the defendant;[3] but if he does not adduce evidence, he is the proper defendant, according to the Zahir Rewayut.

But cannot be preferred after loss of the subject of

If a suit is brought for a specific thing after it has perished, and the defendant adduces evidence that it was with him in deposit, or pledge, or *moozarubut*, or partnership, his evidence is not to be received. When a claim is

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[1] This is chapter vi. in the original digest.

[2] An avoidance may either be of the contest (*khusoomut*), or of the claim (*dâwee*). The former should be preferred immediately after the claimant has stated his case, and if supported by proof, there is an end of the suit. If not, the defendant must answer, and if in the negative, the claimant must then prove his case. Though he should do so, the defendant may still be able to avert the consequence, by pleading, for instance, payment or discharge when the claim is for debt. This is an avoidance of the claim, and the proper time for pleading it is after the claimant has in a manner proved his case (*post*, p. 768). But an avoidance of the claim may be involved in the answer itself. Examples of the two kinds of avoidance, and the different modes of pleading the avoidance of the claim, will be found in this chapter.

[3] Because the right of property which is involved in the claim (*ante*, p. 741) cannot be contested in the absence of the owner.

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suit, nor where the claim is founded on an act.

brought against a person on the ground of an act, as, for instance, by saying, 'You usurped it from me,' and he answers that the thing is in deposit, or loan with him, or the like, on account of such an one, and adduces evidence to that effect, the suit is not averted from him; and if the claim were merely that the thing was stolen, without charging the act to the defendant, still the contest would not be averted though he should adduce evidence to a deposit. This, however, is only on a liberal construction, for by analogy it should be otherwise; and if the allegation were that it was usurped or taken, and the party in possession should adduce evidence that it came to his hands on behalf of a person who is absent, the suit would be averted from the defendant, without any difference of opinion.

Answer to the avoidance.

A person claims a mansion in the possession of another, and the possessor says, 'Such an one placed it under my charge,' to which the claimant replies, 'He did indeed place the mansion in your charge, but he has since given or sold it to you'—the judge should put the defendant on his oath to the effect that 'he did not give it,' or 'did not sell it to you,' and if he decline to swear, should make him defendant; and if the claimant should adduce evidence that such an one sold the mansion to the party in possession, the evidence is to be received, and the defendant made an adversary. If the defendant alleges a deposit without adducing evidence, and the claimant demands his oath, that such an one deposited the thing in dispute with him, the judge is to swear him to the effect, 'By God, he did deposit it.'

An avoidance of the claim when preferred after a general denial, must be consistent with the denial.

When a person has sued another, saying, 'I bought this slave from you for so much,' and the defendant denies the sale, whereupon the claimant adduces evidence to the purchase, and the seller (defendant) then says in avoidance of the claim, 'You have already returned this slave on my hand for a defect,' and adduces evidence, this claim of avoidance is valid, and evidence to it should be heard. A person sues another, saying that he sold him a bondmaid, whereupon the defendant says, 'I never sold her

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to you,' and the purchaser (claimant) adduces evidence of his purchase, and it being found, on the woman being produced, that she has a finger in excess, he wishes to return her, but the seller (defendant) now offers evidence that the purchaser released him from all responsibility on account of defects;—such evidence cannot be received. A woman sues the son of a deceased person, saying that she was the wife of his father, who died while the marriage was still subsisting between them, and demands her share in the inheritance, whereupon the son denies the claim, and she adduces evidence of her marriage; but the son then adduces evidence that his father repudiated her three times, and that her *iddut* had expired before his death:—there is some difference of opinion about this case, but the valid doctrine is that the evidence should be received. If, however, the son had said at the time of the woman's claim, that his father had never married her, or that she never was his wife, and should then offer evidence of a divorce, his evidence could not be received.[1]

A person sues for property on the ground of partnership, and the defendant denies it. He afterwards says, 'There was such and such property in my hands by reason of partnership, but I gave it up to thee,' and the claimant denies the delivery and taking possession of the property; is the claimant to be sworn as to the delivery and taking possession? If the defendant had denied the partnership, and that there was any property in his hands originally, by saying, 'There never was a partnership between me and thee, and I did not take anything from thee by reason of partnership,' the claimant is not to be sworn as to his having taken possession. But if the defendant had said at the time of his denial, 'There is nothing in my hands of the partnership property,' the claimant is to be sworn. And for this reason, because

Otherwise it is not valid.

[1] The avoidance being in the nature of a counter claim is subject to the same rules as the original claim,—one of which is, that there should be no inconsistency between it and a previous assertion made by the claimant.

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tuhleef, or the putting of an oath, depends on the claim being valid; and on the first supposition the claim was not valid by reason of inconsistency,[1] while on the second supposition there is no inconsistency, because a person may very well say that 'there is nothing of partnership property in my hands,' after he has made delivery of it.[2]

An avoidance of the claim may be contained in the answer itself.

A person sues another to the effect that 'My father had a claim against you for such and such property, and has died without receiving payment of any part of it, and the whole has become mine by inheritance, for I am his heir, and there is no heir besides me;' to which the defendant answers, 'The debt which you demand was due to your father by me, by virtue of suretyship for such an one, who paid the whole of this to your father during his lifetime;' and the claimant assents to the assertion that the debt was on account of suretyship for such an one, but denies that such an one ever paid it; whereupon the defendant adduces evidence to his claim (or plea) that the debt was paid. This is a valid avoidance of the claimant's demand. And so, also, if the defendant should say in this wise: 'Your father released me from the suretyship during his life,' or 'you released me from the suretyship after his death,' and should adduce evidence to what he claims, the demand of the claimant would be avoided. A woman claims a fixed dower against her husband, and he says, in avoidance of the claim, 'You have acknowledged that the marriage was without any fixed dower,' the plea is valid. A man claims a mansion in the possession of his father's widow as belonging to his estate, and she says, 'This mansion was left by your father, but the judge sold it to me in lieu of my dower, when you were a child.' This is a good avoidance of the claim, if supported by evidence.[3] If one should sue another for property, and the defendant should acknowledge it—with this exception, that he assigns some reason for having it which is not sufficient to induce liability,—and the claimant denies the reason, but the

[1] Between the avoidance and the answer.

[2] Appendix to the *P. P. M. L.*, No. 21, p. 75.

[3] *Fut. Al.*, vol. iv., p. 71.

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defendant adduces evidence to it, the claim of the plaintiff is avoided.[1]

A person sues for partnership or *moozarubut* property, or property placed in deposit, and the defendant answers 'I returned it,' his word is to be received with his oath; and if the claimant should swear that he never received it, no regard is to be paid to his oath.[2] But if the suit be for the price of something sold, or for money lent, and the defendant should say, 'I returned it,' no regard is to be paid to his assertion, and regard is to be had to the oath of the seller or lender that he did not receive it. The result is, that whenever property is in trust, the word is with the trustee on the avoidance in his answer, and to him also belongs the right of adducing evidence; and that where property is with a person on his responsibility, the evidence is his as to the payment, but not so the word and oath.[3]

An avoidance of the claim on the ground of payment is an admission by the defendant, except in cases of trust.

If the defendant should claim, 'He released me from this claim,' and say to the judge, 'Swear him that he did not release me,' the judge should not swear the claimant, but should rather say to the defendant, 'Answer your adversary, and then claim against him what you please.' Otherwise, if he should have said, 'He released me from this thousand;' for then the judge ought to swear the claimant. A man claims property against another, and the defendant answers, 'The claimant has released me from this claim;' whereupon the judge, assuming this to be an acknowledgment on the part of the defendant, swears the claimant as to the release, and he takes the oath,—can the claimant, after this, be sworn to the property? Khusaf has said, and Aboobekr Ben al Fuzl has concurred with him that the defendant may be sworn, and that his saying 'He released me,' is not an acknowledgment of the pro-

But an avoidance on the ground of the release of the claim does not appear to be an admission of it by the defendant.

[1] *P. P. M. L.*, Appendix No. 20, p. 75.

[2] The expression 'his word is to be received with his oath,' has reference to the original claim, not to the avoidance, which, being in the affirmative, cannot be supported by an oath. See definition, p. 734.

[3] *Fut. Al.*, vol. iv., p. 36. Compare with text and note 6, on p. 739.

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perty, and that the judge ought to have asked the claimant, 'Have you any evidence of the property?' If he had evidence, the judge should afterwards have sworn the claimant as to the release; and if there were no evidence of the property, he should have first sworn the defendant as to the claim of property; for his claim of a release is not an acknowledgment; and if the defendant had taken the oath, he should have been discharged; while, if he had refused it, the claimant should then have been sworn as to the release. The older authorities have said that the claim of a release from a claim is not an acknowledgment. And this is most correct; though, according to Zuheer-ood-Deen, the judge should, in the first instance, have put the claimant on his oath as to the release.[1]

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[1] *Fut. Al.*, vol. iv., pp. 41, 42.—The distinction is only verbal; and it therefore seems that an avoidance on the ground of a release, as well as an avoidance on the ground of payment, is so far an admission of the original claim as to dispense with the necessity of proof of it on the part of the claimant, except in cases of trust, where the defendant, notwithstanding his avoidance, is still at liberty to stand on the defensive and put the claimant to proof of his claim, though he has also the option of proving the avoidance.

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CHAPTER V.[1]

OF THE CLAIM OF TWO PERSONS TO THE SAME THING.[2]

When property is claimed absolutely the proof of the plaintiff is preferred.

MOOHUMMUD has said in the Asul, that when a man claims a mansion, or any other property, moveable or immoveable, which is in the possession of another, and both parties adduce evidence, the property is to be adjudicated on the evidence of the party out of possession, according to 'our three masters;' that is, when no mention is made of a date on either side, or both parties assign dates which are equal. When they both assign dates, but the date of one is prior to that of the other, judgment is to be given for the prior date, according to Aboo Huneefa, and the last opinion of Aboo Yoosuf. When only one of them assigns a date, the property is still to be adjudged to the person out of possession, according to Aboo Huneefa.

Unless a prior date is assigned by the defendant.

When claimed to be derived from the same source, proof of the defendant is preferred; unless a prior date is assigned by plaintiff.

When both the party out of possession and the party in possession lay claim to the property, as having derived it from a cause proceeding from the same person, and both give equal dates, or neither assigns any date, or one assigns a date and not the other, the party in possession is preferred. But if they both assign dates and the date of one is prior to that of the other, the preference is given to the prior in date. When a mansion is in the possession of one person, and another claims to have purchased it from Zeid, and adduces evidence to the fact, while the possessor

[1] Chapter ix. of the original digest.

[2] This may happen either when the defendant, as well as the claimant, asserts a positive right to the thing sued for, or when two different claimants sue for the same thing, which is in the possession of a third party.

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also claims to have purchased it from the same Zeid, but the plaintiff, that is the person out of possession, gives a prior date for his purchase, the property is to be adjudged in his favour. And when 'we' have adjudged in favour of the purchase of the party out of possession, if both the parties should establish the payment of the price before the judge, by the seller's acknowledgment or otherwise, the mansion is to be delivered to the person out of possession, and the possessor has no right to retain it until he obtains repayment from the seller. So also, if the party out of possession alone establishes the payment of the price. But if neither of them can establish the payment of the price, the mansion is not to be delivered up to the person out of possession till the judge receives the payment of the price from him; and if the possessor alone establishes the payment of the price, he is not to be called upon to surrender the property to the person out of possession until he repays it.

When claimed to be derived from different sources the proof of plaintiff is preferred.

When the parties claim to have derived the property from different persons, it is to be adjudged to the party out of possession. When the person out of possession and the possessor claim to have purchased from different parties, and both assign dates, but there is some uncertainty in the date assigned by one of them, the plaintiff claiming, for instance, that he purchased from Zeid a year ago, and adducing evidence, while the possessor adduces evidence that he purchased it from Amroo since a year and more, the evidence is that of the plaintiff. And in like manner, when the witnesses of the defendant have testified that he purchased from such an one a year or two ago, being in doubt as to the excess, judgment is to be given for the party out of possession.

When parties claim as having purchased from each other, proof is to be rejected on both

A mansion is in a person's possession, and one out of possession claims it, saying, 'I purchased it from the possessor,' while the possessor says he purchased it from the person out of possession, and both adduce evidence, neither assigning a date, the evidence is repugnant, whether the witnesses testify to possession having been taken or not, and the mansion is to be left in the hands of the

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possessor, without any adjudication. This is the doctrine of Aboo Huneefa and Aboo Yoosuf. And if the witnesses on both sides should attest the payment of the price, each price is to be set off against the other; while, according to Moohummud, that should be done though the witnesses do not attest the payment, because the price, according to his doctrine, is due in the circumstances.

sides as being repugnant.

Two persons claim a woman by right of marriage, and both adduce evidence. She is not to be adjudged to either unless she make an acknowledgment in favour of one of them. That is, when neither assigns a date, or both assign the same date; but if they both assign dates, and the date of one is prior to that of the other, he is to be preferred; while if the dates are equal, she is to be adjudged to the possessor, and if one only of the parties assigns a date, he is to be preferred. If one has the date and the other possession, preference is to be given to the possessor. And if one has the date, and another the acknowledgment of the woman, the latter is to be preferred. All this on the supposition of the woman being alive; but after her death, if the date of one of the parties should be prior, judgment is to be given for him, and if the dates of both are equal, or neither assigns a date, the marriage is to be adjudged as having been between them, each being liable for half the dower, and taking the share of one husband in her inheritance; and if she should have given birth to a child, his *nusub* or paternity is established from each of them, and he is entitled to the full share of a son in the inheritance of each, but they take in his inheritance the share of only one father. When both the person out of possession and the possessor adduce evidence to a marriage absolutely without a date, judgment is to be given on the evidence of the possessor.

How the preference is determined, in case of two parties claiming marriage with the same woman.

A woman being in the mansion of a man he claims her as his wife, and another who is out of possession claims her, and she assents; according to Aboo Yoosuf the word is with him in whose mansion she is. A person proves that a woman is his wife, and that she is in the power of the possessor without any right, and the possessor says,

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'She is my wife,' to which the woman assents, but judgment is to be given for the marriage of the person out of possession. Yet if the possessor prove a marriage without date, his evidence is preferred. A man says to a woman, 'Your father married you to me when you were little,' and she says, 'Nay, but he married me to thee when I was adult, and I was not content;' the word is with her and the evidence her husband's. When an adult woman adduces evidence in revocation of her marriage after puberty, and the husband adduces evidence to her silence on attaining to puberty, her evidence is to be received.

Dispute as to validity of marriage.

When a husband and wife dispute about the validity of their marriage after the birth of a child, the husband insisting for its being invalid, and the wife claiming its validity, and both adduce evidence, the evidence of the person alleging the invalidity is to be received; and when 'we' accept his evidence as to the invalidity, the maintenance on account of her *iddut* drops, but the paternity of her offspring is established.

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CHAPTER VI.

OF THE BURDEN AND PREFERENCE OF PROOF.[1]

What is proof.

PROOF, as already mentioned, is either acknowledgment, or the evidence of witnesses.[2] Acknowledgment is proof in itself; so that when a defendant in possession acknowledges the claim to be just, he is to be immediately ejected. The evidence of witnesses does not become proof till it is received by the judge; but as its reception is imperative on him when it comes up to the legal conditions, and its legal effect, after it has been received, is to make it imperative on him to decide according to its exigence,[3] the person who has the evidence of witnesses in favour of a claim, is spoken of in the same way as if he had positive proof, because he has the means of obtaining his object as effectually as if he had. The testimony of witnesses is given direct to the matter in dispute. There is thus no room for evidence in the sense usually attached to it in English law—namely, that it is any fact or circumstance from which, either singly or when combined with other facts and circumstances, the fact in dispute may reasonably be inferred.

It is received only on one side of an issue.

Proof is received only to one side of an issue; and is sometimes said to be *ûla* or *on* a party, and sometimes to be *le* or *for* him. Correlatively to these terms, the oath is said to be *on* the other party, and the word *with* him; or, as his word may require to be supported by his oath when

[1] This is an addition to the original digest, and is composed chiefly of inferences from the preceding chapters.

[2] *Ante*, note 2, p. 739. [3] *Ante*, p. 417.

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there is no proof on the opposite side, the word and oath are said to be with him.

The burden of proof is on the affirmant.

'Proof is on the claimant, and the oath on the denier,' according to the saying of the Prophet. 'Denier,' being thus opposed to claimant, the latter is to be understood as meaning the affirmant generally, not merely the original plaintiff in the suit. When the defendant pleads an avoidance of the claim, he raises a new issue on which he becomes the affirmant, and the plaintiff the denier. The defendant is, accordingly, styled the claimant in the avoidance,[1] and the plaintiff the defendant in the avoidance; and the burden of proof which was originally on the plaintiff, is now transferred to the defendant except in cases of trust, where the preference is given to his word on the avoidance, as well as on the original claim.[2]

Difficulty of determining who is the affirmant.

When an avoidance of the claim is preferred at the proper time, that is, after a general denial by the defendant, the question of the burden of proof presents no difficulty. But when the proper time is anticipated, and the avoidance is contained in the answer itself, a question may arise whether the avoidance is not an admission of the original matter of claim. It is so generally, according to the rules of English pleading. Thus, if the claim were for property placed with another in deposit, and the trustee should say, 'I returned it,' or if the claim were for property said to be otherwise due, and the defendant should say, 'He released me,' the plea in either case would be such an admission of liability as would impose on the defendant the necessity of proving his avoidance, in order to relieve himself from the liability. At Moohummudan law there is an exception in the case of property held on trust. But in other cases the avoidance seems to have the same effect that a plea has under the English law.

Whose proof is to be preferrod

When the suit is for property the defendant may, instead of merely denying the right of the claimant, set up a right of his own. Here there are two distinct issues,

[1] *Post*, p. 768.

[2] *Ante*, p. 753.

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and two claimants to the same thing. If they should both adduce evidence, a question will arise whose evidence, or, in other words, which issue, is to be preferred. Some cases illustrative of the doctrine on this point will be found in the last chapter. The doctrine itself may be briefly summed up in the following rules:—When property is sued for absolutely, that is, without assigning any cause of right, and each party adduces evidence of his title, the evidence of the person out of possession is preferred. When the same cause of right is assigned by both the parties, and as being derived from the same source, the evidence of the possessor is preferred. When the same cause of right is assigned, but as being derived from different sources, the evidence of the person out of possession is preferred. But in cases of these three descriptions, if both parties should assign dates for the commencement of their respective rights, the evidence for the prior date is to be preferred. When different causes of right are assigned, as sale and gift, from the same person, preference is to be given to the evidence of sale:[1] and so also, preference is to be given to the evidence of pledge and possession over the evidence for gift and possession.[2] When marriage with a particular woman is the subject of contest, and both parties adduce evidence, the preference is to be determined by the woman herself, unless different dates are assigned, and then the preference is regulated by priority, as in the case of claims for property.

When the whole claim is disputed.

The avoidance is generally of the whole matter claimed; but it may sometimes be partial, as when the parties to a sale, are agreed as to the fact of sale, but differ as to the price, or the quantity of the thing sold, or married parties are agreed as to a dower having been specified, but differ as to its amount. The rules applicable to the former case have been given in the section on mutual oaths in the third chapter, and the rules applicable to the latter in the section on disputes regarding dower in section twelve, chapter seven, of the first book. Many other cases of partial

When the claim is partially disputed.

[1] *Hidayah*, vol. iii., p. 521. [2] *Ibid.*, p. 523.

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difference will be found interspersed among other parts of the work. The general rule with regard to all is, that the evidence of the side which is least opposed to the apparent or probable is to be preferred, though the probabilities are occasionally regulated by fine distinctions which are not very obvious.

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CHAPTER VII.[1]

OF 'MUHAZIR' AND 'SIJILAT,' OR INTERLOCUTORY PROCEEDINGS AND DECREES.

Muhazir and sijilat described.

'MUHAZIR' is the plural of *muhzur*, which means literally an 'appearance;' and *sijilat* is the plural of *sijil*, which means a decree. The *muhzur* contains a statement of the claim, the denial, and the depositions of the witnesses. The *sijil* contains a repetition *verbatim* of the *muhzur*, and also of the words of the witnesses, after which there is a record of the subsequent proceedings up to the final decree. When there is an avoidance it forms the subject of a separate *muhzur* and *sijil*.

How they are to be prepared.

In the preparation of these documents it is a general rule that everything should be set forth fully even to excess. Among other requisites distinct indication is necessary; insomuch that it has been said, that if the words of the *muhzur* were, 'Appeared such an one, and caused to appear with him such an one, then this person who appeared claimed against *him*,' the *muhzur* would not be valid, and that it ought to be, 'Then this person who appeared claimed against this person whom he caused to appear with him.' In like manner whenever it is necessary to mention the claimant and defendant, 'this claimant' and 'this defendant' must be written; so also, if it were said of the witnesses, 'They testified in conformity with the claim,' the *muhzur* ought to be pronounced invalid, and the actual words of the testimony should be inserted, because the judge may possibly imagine that the testimony is in conformity with the claim, when

[1] *Fut. Al.*, vol. vi., p. 247.

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in reality it is not so. It has also been said that it ought to be stated in the *muhzur* of claim, that the witnesses gave their testimony '*after* the claim of the claimant,' and so also 'after the defendant had answered in the negative,' lest it should be supposed that the testimony was given before the claim, or against a confessing adversary; as it is only in some special cases that testimony can be heard in such circumstances. When the witnesses say, 'We attest that this thing is to him,' or say in Persian, 'This is to the claimant,' it is not enough until they explain that they mean his property; for as a person may be connected with a thing by reason of ownership, so also he may be connected with it by reason of *areeut* or commodate loan, and explanation is required to remove the ambiguity. But if they should say in Persian, 'We attest that this boy is *of* such an one,' the words would be equivalent to saying, 'is the property of such an one;' and the judge may decree for the ownership, or he may ask them to explain. If they should say, 'This thing which is claimed is of this claimant,' without saying, 'It is in the hands of the defendant without right,' there is a difference of opinion among sheikhs, but the correct view is, that if the claimant demands only a judgment of ownership the evidence should be accepted, while, if he demands delivery, it is not to be adjudged to him, until they say, 'It is in the hands of this defendant without right.' But is it a condition that the witness should say, 'It is incumbent on this defendant to shorten (or withdraw) his hand?' The sheikhs differ on this point also, but the correct opinion is, that it is not required as a condition, though it would be more cautious to require the witness to say so.

I.—*Form of a 'Muhzur' to establish a Debt.*

After Tusmeeâ[1] 'Appeared at the seat of judgment, in the city of Bookhara, before judge such an one (describing his title, name, and lineage) appointed for judicial matters, and the issuing of decrees at Bookhara between the people

[1] That is the formula, 'In the name of the most merciful God.'

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thereof by such an one (describing the ruler) on such a day, month, and year;' then, if the claimant and defendant are known by their names and lineage to the judge, he should write, 'Appeared such an one, the son of such an one, and caused to appear with him such an one, the son of such an one.' But if the parties are not known by their names and lineage to the judge, he should write, 'Appeared a man who said he is such an one, the son of such an one, and caused to appear with him a person who, he said, is named such an one, the son of such an one. Then this appearer [1] claimed against this person whom he caused to appear with him, that to him this appearer there are due by this person,[2] &c., so many good and real Ney-shabooree *deenars*, weighed by the *mithkal* or standard of Mecca, as a binding debt and proper right for a valid cause, and that this person, &c., while in full possession of all his powers, voluntarily and of his own accord acknowledged the whole of the *deenars* described in this *muhzur* to be a binding debt and proper right due by himself to this appearer for a valid cause; an acknowledgment which this appearer assented to, addressing him—That it is therefore incumbent on this person, &c., to pay the said property to this appearer, and he demands his answer, and asks that the question be put.' After this, if the defendant admits what is claimed against him, there is an end of the case, and no necessity for the claimant to produce his evidence. But if the claim be denied, he must do so, and the *muhzur* proceeds: 'Then this claimant caused persons to appear, who, he said, are his witnesses, and asked me to hear them, to which I assented; and they are such an one, and such an one, and such an one.' Their names, lineage, places of abode, and *musjid* where they worship, are then to be written, and the judge should direct the words of their testimony to be written down on a piece of paper, in the Persian language, that the associate of the judge's

[1] Literally, 'This person who appeared.'

[2] 'Whom he caused to appear with him' is always stated at length in the *muhzur* and *sijil*, though here omitted for the sake of brevity.

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sitting (*sahib-mujlis*) may afterwards read them to the witnesses in the judge's presence; and the form in which the words of their testimony should be taken down is as follows:—'I give witness that this defendant (pointing to him) in my sight, voluntarily and of his own accord, acknowledged,' and said that, 'By me are due to this claimant (and then the witness points to him) twenty *deenars* of real gold of Bookhara, weighed by the *mithkal* of Mecca, as has been recorded in this *muhzur* (pointing to it); and this claimant (pointing to him) assented to the truth of the acknowledgment face to face.' Then the associate of the sitting should read the words to the witnesses in presence of the judge, and the judge should say to the witnesses, 'Have you heard the words of this testimony which has been read to you, and do you testify so from beginning to end?' Whereupon if they say, 'We have heard them, and we do testify so,' the judge should say to each one of them, 'Say that I give this testimony as the Khwajah Imam has read from beginning to end in favour of this claimant against this defendant;' and the judge should point to each of them till he comes to the words of the testimony from beginning to end, as it has been read to them; and when they come to this he should then write in the *muhzur*, after writing the names and lineage of the witnesses, and their places of abode, and *musjids*,—'Then these witnesses testified, after their testimony was required, and after the claim of the claimant, and the answer in the negative by the defendant, a valid and straight (or direct) testimony agreeing in words and meaning from a book which was read to them together, and each of them pointed in the proper places.'

II.—*Form of a 'Sijil' on the preceding Claim.*

After *Tusmeeâ* saith judge such an one (and then proceed as in the *muhzur verbatim* to the end), after which the *sijil* proceeds, 'Then I heard the words of their testimony, and I established or entered it among the bound *muhzurs* in the *khureetah* (or bag) of orders.' After this,

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if the witnesses are known by the judge to be just persons, he should write, 'And I accepted their testimony because they are known to me to be just persons, whose testimony is lawful.' And if they are not known to the judge to be just persons, but have been justified by purgators, he should write, 'And to ascertain their condition I made a reference to persons whose business it is to justify in the district.' After this, if the witnesses have been justified, he should say, 'I accepted their testimony.' This is required when the person testified against objects to the witnesses; but if there is no objection to them, the judge should write, 'and the defendant did not object to the witnesses, nor request me to inquire into their condition by means of the purgators of the district; and I was satisfied with their apparent justice, as exhibited by their being of the Mussulman faith, according to the opinion of those of the learned who think that is sufficient, and I accepted their testimony, and what these witnesses testified was established to my judgment against the person against whom they did testify, and I informed him of its establishment to my satisfaction, and I gave him an opportunity to adduce any avoidance which he might have of the claim; but he adduced none, nor did he produce any release; and his inability to do so was manifest to me. Whereupon, this claimant in whose favour the testimony was given, asked of me an order against this person against whom the testimony was given, for the matter thus established before me, and that I should write him a *sijil* for it, duly attested, that it might be proof to him hereafter. And I asked the blessing of Almighty God on this matter, and besought Him to keep me pure from bias and wavering and falling into error, and I decreed in favour of this demand, against this defendant, by the establishment of his acknowledgment, for the property, the sum, kind, quality, and number of which are mentioned in this *sijil*, as a binding debt and proper right for a valid cause in the manner shown in this *sijil*, by the testimony of these witnesses of known justice, or whose justice has been made manifest by purgation (as the case may

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be), in the presence of the claimant and defendant (pointing to each one of them), in the place of judgment in the city of Bookhara; and I have made it imperative on this person against whom the decree has been given, to pay the said sum in kind, quality, and amount aforesaid, to this person in whose favour the decree has been given; and I have written this *sijil* as proof in his favour, and have called upon just, learned and trustworthy persons among those present to attest it. All this on such a day and such a year.'

This is the general form of the *sijil*, to be varied only in the statement of the claim.

III.—*Form of a 'Muhzur' to establish an Avoidance of the preceding Claim.*

After the words of form, and appearance of the parties as in the first example, the *muhzur* proceeds:—'Then this appearer claimed against this person, &c., in avoidance of a claim for twenty *deenars*, which this person, &c., had heretofore made against this appearer, alleging, &c.' Here the words of the claim are copied *verbatim*, as in the first examples. 'But this appearer claimed against this person &c., that he had annulled his claim, because this person, &c., had received the said *deenars* from this appearer, by this appearer's paying the whole, as this person, &c., acknowledged voluntarily and of his own accord, an acknowledgment which this appearer assented to, addressing him; wherefore it is proper that this person, &c., should abandon his claim against this appearer; whereupon he demanded an answer, and asked that the question be put.' This is when no decree was passed on the first claim; but if a decree was passed, the *muhzur* should proceed, immediately after the statement of the first claim, as follows:—'And he adduced evidence of his claim after its denial, and an order was passed by me in favour of this person, &c., against this appearer.' After the words 'the question be put,' the *muhzur* proceeds:—'And the judge asked him respecting this, and he said in

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Persian, "I have not cancelled the claim;" whereupon the claimant in avoidance produced certain persons, saying that they were his witnesses and asked me to hear their testimony.' Then the *muhzur* proceeds, as in the first example, to give the words of the testimony, which are to be varied according as the testimony is to an acknowledgment or to actual seeing of the payment, and concludes in the usual way.

IV.—*Form of a 'Sijil' on the preceding Claim in Avoidance.*

'Saith judge such an one, appeared and caused to appear.' Here the words written in the *muhzur* are to be repeated from first to last; and when the judge has done writing the testimony of the witnesses to the claim in avoidance, he will write—'Then I heard their testimony, and I entered it among the bound *muhzurs* in the *khureetah* of orders, and what they testified was established, to my judgment, against the person against whom the testimony was given; and I represented this to the defendant in the avoidance, and I informed him of the matter being established, and I gave him an opportunity to adduce an avoidance, if he had any, of this claim; but he adduced none, nor did he produce any release; and his inability to do so was established to my satisfaction; whereupon this claimant in avoidance, in presence of this defendant in avoidance, asked of me an order in his favour for what was established to my satisfaction in his favour, and that I should write a *sijil* with proper attestation, and I passed the order,' &c., &c. Then the *sijil* proceeds as in the first example, the form being varied in the statement of the original claim and of the avoidance, according as the case may be.

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SUPPLEMENT

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PREFACE

TO

THE SUPPLEMENT.

It is only a very general idea of the Moohummudan Law of Sale that I can attempt to give in the brief space to which this Supplement is necessarily limited. The first chapter is a translation of the authorities applicable to sale, contained in the Appendix to Sir W. Macnaghten's *Principles of Moohummudan Law*; and each rule in the chapter being marked with the same number as the corresponding rule in the Principles, the reader has an opportunity of comparing them together, if so inclined. He will find that they do not always agree, and even that in some instances there is a material difference between them. Much of the law has fallen into disuse since the general introduction of the precious metals, as the representatives of price in contracts of exchange. This may have led the learned author of the Principles to accommodate his authorities to the altered state of circumstances. But the rules by which the exchange of different commodities is regulated have not been changed, and are still dependent on the nature of the things themselves, and the fact of their being dealt with specifically or indeterminately. These distinctions the learned author has apparently overlooked, and has thus left unnoticed some of the leading peculiarities of the Moohummudan system. These I have

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endeavoured to restore by a closer adherence to the original authorities. But the attempt has imposed on me the necessity of entering into some preliminary explanation, and also of making some additions to the text, which,' though immediately referred to my own work on the Moohummudan Law of Sale, are derived originally from the Futawa Alumgeeree, and thus rest upon established authority. The explanation and additions have been thrown partly into the form of an Introduction, and partly into notes on each page. There may still, I fear, remain a good deal of obscurity in some of the rules. This might perhaps have been avoided by a different arrangement of the authorities, which are thrown rather loosely together. But, as Sir W. Macnaghten's Principles have been so long in the hands of candidates for the Indian Civil Service, I thought it better to adhere to them as closely as I could without perpetuating error, rather than to substitute something entirely my own.

The other two chapters on Reba and Kurz, of which the Supplement is composed, are transfers (the former considerably abridged) from the volume on the Moohummudan Law of Sale above mentioned.

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OF SALE.

Introduction.

SALE in its ordinary acceptation is a transfer of property in consideration of a price in money. In Moohummudan Law it has a more comprehensive meaning, being defined to be an exchange of property for property with mutual consent. It therefore includes not only Barter, but also Loan when the articles lent are intended to be consumed and replaced to the lender by a similar quantity of the same kind.

Things are the proper subject of sale, to the exclusion of mere rights; and things have been divided into two classes—Similars and Dissimilars. Similars are things which are usually sold by weight or by measure of capacity, that is, dry or liquid measure; and dissimilars are things which are not sold or exchanged in either of these ways. Articles which are nearly alike and are commonly sold by number or tale, are classed with the first division of things, and may be termed similars of tale; while articles which differ materially from each other, yet are still sold by number, belong to the second division, and may be called dissimilars of tale.

Similars of weight and capacity have a common feature of resemblance which distinguishes them in their own nature from other commodities. They are aggregates of minute parts which are either exactly alike, or so nearly resemble each other that the difference between them may be safely disregarded. For this reason they are usually dealt with in bulk, regard being had only to the whole of

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a stipulated quantity, and not to the individual parts of which it is composed. When sold in this manner they are said to be indeterminate. They may, however, be rendered specific in several ways. Actual delivery, or production with distinct reference at the time of contract, seems to be sufficient for that purpose in all cases. But something short of that would suffice for all similars but money. Thus, flour or any kind of grain may be rendered specific by being enclosed in a sack, or oil or any liquid by being put into casks or jars; and though the vessels are not actually produced at the time of contract, their contents may be sufficiently particularised by descriptions of the vessels and their locality. Money is not susceptible of being thus particularised, and cannot be rendered specific by description, or specification as it is more literally termed. Hence, money is said to be always indeterminate unless actually produced. Other similars, including similars of tale, are sometimes specific and sometimes indeterminate. Dissimilars including those of tale are always specific.

Similars of weight and capacity are distinguished in the Moohummudan Law from all other descriptions of property in a very remarkable way. When one article of weight is sold or exchanged for another article of weight, or one of measure is sold or exchanged for another of measure, the delivery of both must be immediate from hand to hand, and any delay of delivery in one of them is unlawful and prohibited. Where again the articles exchanged are of the same kind, as when wheat is sold for wheat, or silver for silver, there must not only be reciprocal and immediate delivery of both before the separation of the parties, but also absolute equality of weight or measure, according as the articles are weighable or measurable, and any excess on either side is also unlawful and prohibited. These two prohibitions constitute in brief the doctrine of *reba* or usury, and their application forms the subject of the second Chapter of this Supplement. The word *reba* properly signifies excess, and there are no terms in Moohummudan Law which correspond to the words interest and

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usury, in the sense attached to them in the English language; but it was expressly prohibited by Moohummud to his followers to derive any advantage from loans, and that particular kind of advantage which is called by us interest, and consists in the receiving back from the borrower a larger quantity than was actually lent to him, was effectually prevented by the two rules above mentioned.

Though Barter and Sale are confounded under one general name it is usual to distinguish one of the things exchanged as the subject of sale, or the thing sold, and the other as the price. The former is termed *mabeea*, and the latter *sumun*; and, in order to determine in any particular contract which of the things exchanged is to be considered the one, and which the other, things have been further divided into different classes according to their capacities for performing the functions of price. The first class comprises *dirhems* and *deenars*, the only coined money known to the old Arabs, and they are always price. The second class comprises the whole division of dissimilars (with the exception of cloth) which are always the things sold. The third class comprises, 1st, all similars of capacity; 2nd, all similars of weight, except *dirhems* and *deenars*; and all similars of tale. The whole of this class is capable of supporting both functions, and is sometimes the thing sold, and sometimes the price. The fourth class comprises cloth and the copper coin called *fooloos*, which, though in their own nature goods or merchandise, become the representatives of price when generally adopted or accepted as such.

Sale implies a reciprocal vesting of the price in the seller and of the thing sold in the purchaser. This is called its legal effect; and sales have been divided into different stages or degrees of completeness, according as this effect is immediate, suspended, imperfect, or obligatory. Thus sale must first of all be duly constituted or contracted, either by the use of appropriate words properly expressed, or by reciprocal delivery (No. 2, p. 784); and, as soon as this takes place, a right of property in the thing sold

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and in the price is at once established in the purchaser and seller respectively, when the sale is absolute.[1] But sale may be contracted without sufficient power on the part of the seller or purchaser, and, whenever that is the case, the establishment of mutual rights in the parties is suspended until the sale is allowed by the person who has the power to do so.[2] Sometimes, again, though there is sufficient power to contract, there may be some taint of illegality in the constitution or subject of sale, or in other circumstances connected with it, which prevents it from taking effect, and thus renders it imperfect. The causes of illegality are many and various;[3] yet, though a sale should be unlawful, if possession of the thing sold is taken with permission of the seller, the sale will so far take effect that the right of property will vest in the purchaser. A degree of imperfection, however, still adheres to it; for it is held to be abominable in him to make any use or disposal of the thing sold, and the sale is liable to be dissolved. Yet if he should actually sell the thing to another, the right of dissolution would be lost.[4] Finally, though a sale be unimpeachable on any of the grounds mentioned, there may still be something which prevents it from being obligatory on one or both of the parties. Thus, there are four kinds of conditions to which Sale is subject; viz. conditions that are necessary to constitute it; to give it operation; to render it valid; to make it obligatory. Of the first kind, which may be called essential, some relate to the contracting parties, of which Nos. 10 and 11 in the first chapter are examples; some to both the things exchanged, such as No. 8 note 1, and No. 13; and some to the thing sold in particular, as Nos. 14 and 20. Of the second kind, or those that are necessary to give operation to a sale, there are only two conditions: first, a right of property in both the articles exchanged; and, second, that none but the seller have any right in the thing sold.[5] Of the third kind, or those that are required for validity, some are

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[1] *M. L. S.* p. 6 [2] *Ibid.*
[3] *Ibid.* chap. ix. [4] *Ibid.* p. 211. [5] *Ibid.* p. 4.

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general, such as Nos. 13 and 16, and some are special, as Nos. 15 and 20. And with regard to the fourth kind, all that is necessary in addition to the conditions above mentioned, is freedom from option or a right of cancellation. The Prophet himself recommended one of his followers to reserve a *locus pœnitentiæ*, or option for three days in all his purchases. This has led to the option by stipulation (No. 17) which may be reserved to either or both of the parties. Besides this, the purchaser, without any stipulation, has an option of inspection with regard to things which he has purchased without seeing (No. 26), as the seller has with regard to the consideration when it is specific (No. 27). Further, the purchaser has an option, also without stipulation, on account of a defect in the thing purchased of which he was not aware at the time of sale (Nos. 25 and 28). But this right is lost by any exercise of ownership over the thing purchased after knowledge of the defect (Nos. 25 and 32); or even before it, with this difference, that in the latter case he is entitled to compensation for the defect,[1] but not in the former, for the act amounts to an acquiescence in the defect.[2] The right to return the article purchased is also lost by its sustaining any blemish before discovery of the defect, and by other causes,[3] though the purchaser is entitled to compensation for the defect (No. 28). Even exposing to sale the thing purchased, after discovery of a defect, amounts to acquiescence, and debars the purchaser from his right to return the article, or even to claim compensation for the defect.[4] But an actual sale before discovery of a defect does not preclude him, if the thing is returned on his hands on account of the defect, from returning it to the original seller (No. 31), provided he can prove the existence of the defect at the time of the first purchase. This is implied in all cases where a purchaser avails himself of his option.[5] Other examples of this option and the rules applicable to them, will be found

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[1] *M. L. S.* p. 109. [2] *Ibid.* [3] *Ibid.* p. 110.
[4] *Ibid.* p. 108. [5] *Ibid.* p. 118 *et seq.*

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in Nos. 29 and 30. The greatest of all defects is a want of right or title in the seller; and when a right in the thing sold is established against a purchaser; he may, unless the sale is allowed by the claimant, have recourse to the seller for the price, whereupon the contract is cancelled.[1] Combining this with the option of defect, a complete warranty may be said to be implied in all absolute sales (No. 21).

There are two other divisions of Sale mentioned in the second chapter (Nos. 3 and 9). It is only the first of these that calls for any explanation in this place. This division refers specially to the *mabeea* or thing sold, with respect to which sale is said to be of four kinds. In the first of these, which is called *Mookaizah*, both the thing sold and the price are specific, and the transaction corresponds nearly to barter, but barter comprehends the exchange of indeterminate things also, which would not fall under the description of *Mookaizah*. In the second kind of sale, which is called *Surf*, both the things exchanged are indeterminate, or more properly both are price; and it is not necessary that they should always be indeterminate, for an exchange of money for bullion, or bullion for bullion, is a *surf*. It is essential to the legality of this kind of sale, that both the things exchanged should be delivered and taken possession of before the separation of the parties,[2] and that when they are of the same kind, as silver for silver, or gold for gold, they must also be exactly equal by weight. These rules are necessary for the avoidance of *reba* as already explained. In the third kind of sale, which is called *Sulum*, the subject of sale is indeterminate and the price specific. The word means literally an advance, and in a *sulum* sale the price is immediately advanced for goods to be delivered at a future fixed time. As the subject of sale is indeterminate it is only things of the class of similars that can be sold in this way,[3] and as the price must actually be advanced and delivered at the time

[1] *M. L. S.* pp. 234, 233. [2] *Ibid.* p. 313.
[3] *Ibid.* p. 262.

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of the contract before the separation of the parties,[1] and must therefore, even in the case of its being money, be produced, and in consequence be particularised or specific, the transaction falls strictly within the definition of this kind of sale. In the fourth, which is the ordinary kind of sale, the thing sold is always specific, for, though similars may be sold in this manner, they must be rendered specific in some of the ways before mentioned, and be produced at the time of sale.

In *Kurz* or loan for consumption, which forms the subject of the third chapter of this Book, the borrower acquires an absolute right of property in the things lent, and comes under an engagement to return an equal quantity of things of the same kind. The transaction is therefore necessarily limited to similars; but it comprehends similars of tale as well as similars of weight or capacity. But when the things lent are of the latter description, the two rules above mentioned for the prevention of *reba* must be strictly observed. Hence it follows that any stipulation on the part of the borrower of such things (and it is to be observed that gold and silver, whether coined or not, are treated as articles of weight), for delay or forbearance by the lender, or any stipulation by the lender for interest to be paid by the borrower, are alike unlawful.

Notwithstanding the stringency of the rules for preventing *reba* or the taking of any interest on the loan of money, methods are found for evading them, and still keeping within the letter of the law. It had always been considered lawful to take a pledge to secure the repayment of a debt. Pledges were ordinarily of moveable property, and when given as security for a debt, and the pledge happened to perish in the hands of the pawnee, the debt was held to be released to the extent of the value of the pledge. Land, though scarcely liable to that incident, was sometimes made the subject of pledge; and, whether the pledge were moveable or immoveable, the pawnee

[1] *M. L. S.* p. 259.

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might be authorised to make use of it, so that if it were injured in the use he would not be responsible. The permission might, however, be withdrawn at any time, and when it was matter of agreement that the pawnee should derive some benefit from the use of the pledge, some device was necessary to prevent the withdrawal of the permission. For this purpose a condition was added that whenever the pawner should prohibit the use of the pledge, the prohibition should operate as a renewal of the permission so long as the debt remained unpaid.[1] Though, strictly speaking, pledges could be lawfully taken only as security for a debt, it appears that they were sometimes given as security for a loan; and if permission were given to the lender to make use of the pledge, as in the case of land, to sow it and appropriate the produce, he would thus be enabled to derive some benefit from the loan, which, though held to be abominable, was still within the strict letter of the law. The moderate advantage to be derived in that way does not seem to have satisfied the money lenders, and the expedient of a sale with a condition of redemption was adopted, which was called *Bye-al-wufa*, and very nearly resembles an English mortgage. Some account of it is given at the end of the third chapter of this Supplement; and it will be seen that there were two leading opinions regarding it. One of these treats it as a pledge, and the other as a sale. The authorities in the Text, which are those cited in the Futawa Alumgeeree, seem to lean to the former opinion, while the author of the Hidayah appears to treat it as an ordinary sale. It is important to observe that no allusion is made in the first-mentioned authorities to any period of repayment in the condition for re-sale, while in one of the commentaries on the Hidayah express mention is made of a *meed* or time of payment, and the author adds: 'the wufa is binding at its fixed period,' as if when the period has passed without payment, the *wufa* would be no longer binding and the sale would become absolute. This inference I ventured

[1] *Fut. Al.*, vol. v. p. 671.

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to make in the Introduction to my work on Sale, and it is confirmed by the description of the *Bye-bil-wuffa*, as it is termed, in the Preamble to Regulation 1 of 1798 of the Bengal Code. Since then there has been a decision to the same effect by the Privy Council, which is reported in the thirteenth volume of Moore's Indian Appeals, p. 566.

In a *Bye-al-wufa*, without a fixed term of payment the *wufa* would be no more than an engagement to do what is implied in every pledge, and the seller would apparently be entitled to redeem at any time on repayment of the money borrowed, while the purchaser would, as in an ordinary *kurz*, have an equal right to demand his money whenever he pleased, and would apparently be liable for rent if he made any use of the land without the permission of the seller.—See *post*, page 808, note 3.

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CHAPTER I.

DEFINITION, CONSTITUTION, LEGAL EFFECT, AND CONDITIONS OF SALE.

Definition.

1. SALE is an exchange of property for property with mutual consent.

How effected.

2. Its pillar is of two kinds; one being declaration and acceptance,[1] and the other reciprocal delivery.

Kinds of—with reference to the thing sold.

3. With reference to the thing sold, sale is of four kinds; sale of a specific for a specific thing, which is *Mookaizah*; sale of an indeterminate for an indeterminate thing, which is *Surf*; sale of an indeterminate for a specific thing, which is *Sulum*; and the reverse of this, or sale of a specific for an indeterminate thing, as the generality of sales.

Kinds of—considered absolutely.

4. Considered absolutely, sale is of four kinds; operative, suspended, imperfect, and void.

Operative sale.

5. The operative sale is that which takes effect immediately.[2]

Suspended sale.

6. The suspended sale is that which takes effect when allowed.[3]

Imperfect sale.

7. The imperfect sale is that which takes effect on seizin, or possession of the thing sold.[4]

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[1] It is contracted by any words in the past or present tense which import the transfer and acceptance of property. But if the aorist, which is indefinite in the Arabic language as expressing both present and future, be employed, intention is necessary.—*M. L. S.*, p. 8.

[2] For the legal effect of sale, see *ante*, p. 777.

[3] As, for instance, sale by an intelligent minor, who is competent to contract though the sale is inoperative until consented to by his guardian.

[4] The defect, however, cannot be said to be cured, as stated in the

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8. The void sale is that which has no effect *ab initio*.[1] Void sale.

9. As to naming the consideration, sale is of four kinds. *Moosáwŭmŭt*, which is sale for a price that the parties have agreed upon; *Moorábŭhŭt*, which is sale for the prime cost and something more; *Towleeŭt*, which is a sale at the exact prime cost and nothing besides; and *Wuzeeŭt*, which is a sale for less than the original cost. Kinds of sale with reference to the prime cost.

10. It is requisite that there should be separate contracting parties, and it is not proper that there should be only one contractor on both sides,[2] except in the cases of a father, his executor, and a judge, when they sell their own property to a minor, or buy his from him, a messenger when employed on both sides, and a slave when he buys his own freedom from his master by his direction. Conditions. There must be a contracting party on each side. Exceptions.

11. There are several kinds of conditions essential to the constitution of the Contract. Among these it is required that the contracting party have understanding and sufficient discretion; and sale by a minor or a lunatic who understands the nature of sale and its effects is valid.[3] The parties must have understanding and discretion.

12. There can be no stipulation for delay with regard to the thing sold when specific, and the price when specific; but it is lawful with a thing sold that is indeterminate and a price that is indeterminate.[4] When postponing payment or delivery is illegal.

P. P. M. L. (No. 7); for the sale is still liable to be dissolved, *M. L. S.* p. 211, and *Hedaya*, vol. ii. p. 455; and see *ante* p. 778.

[1] When either of the things exchanged is not property, or when the thing sold, though property, has no value in law, the sale is *null*. Where only the price wants that value, the sale is invalid (*M. L. S.* p. 210). Everything but carrion and blood may be property (*Ibid.* p. 2, note §). Wine and pork being forbidden to *Mooslims* have no value in law (*Ibid.* p. 3, note ‡).

[2] There would in fact be no contract; this being a condition essential to the constitution of sale.—*M. L. S.*, p. 2.

[3] For other essential conditions see *M. L. S.*, pp. 2 to 4.

[4] It is worthy of remark that it is only when the thing is specific that there is any objection to a stipulation for delay in its delivery, and that the objection applies equally whether the specific thing be price or the subject of sale. If the objection had any application to indeterminate things there could be no stipulation for delay in the payment of the price of any thing, and a *sulum* sale would be im-

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Price and thing sold must be known.

13. Among the conditions of sale it is necessary that the thing sold and the price should be so known as to preclude future dispute.[1]

The thing sold must be in existence and have value in law.

14. It is also necessary that the thing sold be in existence, and there is no contract of sale when the thing sold is non-existent or is in danger of extinction. Further, that it be property having value in law,[2] and be susceptible of delivery either immediately or at some future period.

Equality when requisite.

15. Among them (the conditions[3]) is similarity between the things exchanged when liable to the objection of *Reba* or Excess.

Conditions that vitiate the contract.

16. [And among them is freedom from vitiating conditions which are of various kinds] among which is anything conditioned that is contingent, or a condition not in harmony with the contract and in which there is some advantage to the seller, or the buyer, or the subject of sale when a human being. But though an option be stipulated for more than three days, or if the time is not limited, or is unknown, yet if the contract be allowed within the three days, or the option should expire by reason of the death of the stipulator or the occurrence of anything else that renders the contract obligatory, it becomes lawful.[4]

How the contract may notwithstanding be rendered lawful.

Option by stipulation.

17. The contract is valid with a condition of option to

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possible, for delay in the delivery of the thing sold is essential to that contract.

[1] This is only a condition of validity.—*M. L. S.*, p. 4.

[2] See note to No. 8.

[3] That is, conditions of validity (*M. L. S.*, p. 6). As to the things liable to the objection of *Reba*, see *post*, Chapter II.

[4] The words corresponding to those within brackets, though found in the original authority, are omitted in the extract, which is thus made to require the things excluded in the original. Moreover, the extract is made up of two passages, which are from different authors, and occur in different chapters, in the Futawa Alumgeeree. The second passage, which ought, I think, to come in at the end of No. 18, does not appear to me to afford any authority for the general conclusion, that if extraneous conditions involving an advantage to either party be actually performed, the contract will stand good. And see *M. L. S.*, p. 198. As to vitiating conditions generally, see *Ibid.*, p. 196 *et seq.*

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one of the contracting parties or to both of them together. According to Aboo Huneefa it is not lawful for more than three days; but according to the Disciples it is lawful when a known definite period is mentioned. The opinion of the master, however, is held to be valid in the Juwahir-al-Akhlatee.[1]

The option cannot be for a time manifestly uncertain.

18. The contract must be free of any condition of option for a time manifestly uncertain, as the blowing of the wind, the fall of rain, or the arrival of a certain person; or even where the uncertainty is inconsiderable, as the time of reaping or treading out the corn, or the arrival of the Pilgrims. And also free from a condition of an option unlimited as to time or for a longer period than three days. And it is specially necessary in sale for a price not immediately payable that the time for payment should be known. So that if the time be unknown, the sale is vitiated.

Sale in consideration of a debt.

19. A person has ten *dirhems* owing to him by another, and the person by whom they are owing, sells a *deenar* to him in exchange for the ten, and delivers the *deenar*; whereupon the parties set off the ten *dirhems* which they respectively owe against each other. This is lawful.[2]

Sale of moveable property unlawful before possession.

20. The thing sold when moveable cannot be lawfully resold till possession has been taken of it.

Warranty implied.

21. An absolute contract requires freedom from defects; on failure of which the purchaser has an option, lest he should be injured by being obliged to take property which he never agreed for.

On discovery of defect purchaser may rescind the contract.

22. When a purchaser has become aware of a defect in the thing sold, he has an option, and may take it at the full price, or if he please reject it.[3]

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[1] Approved and adopted by the compilers of the *Futawa Alumgeeree*. See *M. L. S.*, p. 64. 'An option is a power to cancel, not to confirm, the contract.' See *ante*, p. 779.

[2] This is authority for a sale in consideration of one's own debt; but 'a sale in consideration of a debt due by another party than the seller is invalid, contrary to the case of a sale where the consideration is the seller's own debts.'—*M. L. S.*, p. 6.

[3] This is called the Option of Defect, for which see *ante*, p. 779 and *M. L. S.*, p. 98, and *Hedaya*, vol. ii., p. 460.

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What is included in a sale of land.

23. When a person has sold land or a vineyard without mentioning 'its rights and advantages,' or 'everything small and great belonging to it,' all things erected on it for permanence enter nevertheless into the sale, such as saplings and trees; but fruit and growing corn do not enter into the sale, on a favourable principle of construction, unless made the subject of special condition.

Effect of option by stipulation in the seller's right in the property and purchaser's right in the price.

24. When an option is stipulated for the purchaser, his right in the price does not diminish, by general agreement of the learned; and an option in the seller prevents the right of property in the thing sold from passing out of him; so that if the purchaser should take possession of it, and it should perish during the period of option in his hands, he is responsible for its value.

Option how annulled.

25. When a purchaser exercises any right of ownership over the things purchased after knowledge of the defect, his right of rejection is annulled.

Option of inspection to purchaser.

26. When a person has purchased a thing which he has not seen, he has an option on seeing it, and may either take it at the full price, or if he please reject it; and it makes no difference whether he finds the thing to be as it was described to him, or the contrary.[1]

Option of inspection to seller when the price is specific.

27. And as an option with regard to the thing sold is established in favour of the purchaser, so it is established in favour of the seller with regard to the price unless it is specific.[2]

On discovery of a defect purchaser may cancel the sale.

28. When a person has made a purchase and was not aware, at the time of sale or previously, of a defect in the article bought, he has an option, whether the defect be small or great, and may either be content with it at the full price or reject it. But if it has received a further

Exception.

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[1] This option does not extend to commodities estimated by weight or measure of capacity where not distinctly specified. It is therefore inapplicable to the goods advanced for under a *Sulum* sale which are necessarily indeterminate.—*M. L. S.*, p. 85.

[2] The option of the seller is strictly limited to the price; for with regard to the thing sold he has no option whatever—as, for instance, if he should inherit something and sell before seeing it.—*M. L. S.*, p. 85.

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blemish, whether providentially or otherwise, and he then discovers a defect which existed in it while with the seller, he is only entitled to compensation for that defect, and cannot reject the thing sold unless the seller is content to take it back with the new blemish which it has sustained in the hands of the purchaser.

Rule in case of sale by purchaser.

29. But if the purchaser has lost his right of ownership, by sale or the like, he can no longer claim compensation for the defect. In all cases, however, where if the thing sold had remained under his ownership he would have been precluded from rejecting it, he has a right, after his ownership has been lost by sale or otherwise, to compensation for the defect.[1]

Cases in which restitution may be demanded, or only compensation.

30. When a person has purchased an egg, melon, cucumber, gourd, or walnut, and broken it and then found it to be bad, he is entitled to restitution of the full price, unless he has derived some benefit from it; but if he have derived any benefit from it notwithstanding its badness, he has no right to reject the article, because the breaking it constitutes a new defect; but he is entitled to compensation for the original defect, as some remedy so far as possible for the injury which he has sustained.

A purchaser who has sold a slave and has had him returned for a defect, may return him to the original seller.

31. A person has sold a slave, and the purchaser having sold him, he is returned on his hands for a defect under the decree of a judge. In such circumstances the purchaser may return the slave to the original seller, whether the decree were passed on the purchaser's acknowledgment of the defect, or on proof of it by witnesses, or on his refusal of the oath when put to him.

Remedy against seller how lost.

32. A person has purchased a female slave, and finding that she has an ulcer applies remedies to it. Or supposing the purchase to be of a beast, rides it on some occasion of his own. This amounts to acquiescence; for it is evidence of an intention to retain the subject of sale. Contrary to the case of Option by Stipulation, which being

[1] An addition made to the thing purchased would have that effect; but there are many other acts of the purchaser which would equally prevent his returning the article purchased if it were still in his possession.—See *M. L. S.*, p. 109 *et seq.*

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for the purpose of trial, its object cannot be obtained without some use of the thing sold.

General rule when two things are purchased together and a defect is found in one of them.

33. When a person has purchased two slaves or two garments, or the like by one bargain, and takes possession of one of them, and then finds a defect in the other, of which he has not taken possession, he must take both at the full price, or reject both; but he cannot take the perfect one and reject the defective one for a part of the price. In this case, there is a difference of opinion if the defect be found in the thing of which possession has been taken, but the correct view is here also that he must take or reject both, and that he cannot say I will take the defective one with a compensation for the defect. Where, again, he has taken possession of both, that is of the two slaves, and then finds a defect in one of them, he may reject that one specially, but he cannot reject both except with the consent of the seller. It is only, however, when the thing can be used separately, as in the case of the two slaves, that the defective one may be rejected specially; but if this cannot be done, that is, if they cannot be used separately, as in the case of a pair of boots, and a defect is found in one of them, the purchaser must reject both, or keep both at the full price.

34. The Prophet has forbidden *nujish*,[1] and *sowur*, and *ilka-ool-hujr* (throwing the stone[2]) and selling by a citizen to a countryman, and sale during the call to prayers on Friday.

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[1] Over-bidding without intending to purchase, and merely to allure a purchaser to raise his bid, which is held to be abominable. —*M. L. S.* p. 305.

[2] 'Which is when a pebble is thrown at several pieces of cloth, and it is agreed that whichever is struck shall be sold.'—*Ibid.* p. 187.

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CHAPTER II.

OF REBA OR USURY AND THE RULES REGARDING IT.

Definition of *Reba*.

In what articles it is forbidden.

REBA is described in law to be an excess of property to which no consideration is opposed in an exchange of property for property; and it is forbidden[1] in every commodity estimated by measure of capacity or weight when sold for its kind. The causes of its illegality are quantity and sameness of kind;[2] by the former of which is to be understood measure in commodities that are estimated by measure of capacity and weight in those that are estimated by weight. Hence when any measurable commodity, such as wheat, barley, dates or salt, or any weighable commodity like gold or silver, is sold for its kind, like for like, the sale is valid; but if one of them be in excess the sale is not valid. Goodness and badness are not taken into account; so that in respect of articles exposed to the objection of *reba*, the sale of good for bad is not valid except as similars for similars. It is to be observed, however, that superiority of quality is not to be disregarded

[1] By these express texts of the Korán: 'God hath permitted selling and forbidden usury.' 'But whoever returneth to usury they shall be the companions of hell fire, they shall continue therein for ever.' 'God shall take his blessing from usury.'—*Sale*, vol. i., p. 50.

[2] The origin of this is the well-known saying of the Prophet: 'wheat for wheat, like for like, hand to hand, and excess is usury;' and he enumerated six articles as being all alike, viz. wheat, barley, dates, salt, gold, and silver. *Hidayah* and *Kifayah*, vol. iii., p. 168. The saying of the Prophet is not rendered in Mr. Hamilton's translation, though it occurs in the printed original, and a definition of usury is given in the former which is not found in the latter. *Hedaya*, vol. ii., p. 489.

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so far as concerns property belonging to minors or to *Wukfs*; insomuch that a guardian cannot lawfully sell good for bad even in commodities to which the objection of *reba* is applicable. It is also to be observed that one handful may be lawfully sold for two handfuls (and the rule is the same with regard to half a *saa*),[1] or that one apple may be sold for two apples, and in like manner an egg may be sold for two eggs, or one date for two dates, or one nut for two nuts; and even one *fuls* may be validly sold for two *fooloos* distinctly specified, according to Aboo Huneefa and Aboo Yoosuf, though Moohummud entertained the contrary opinion.

Not limited to eatables.

Any articles of the above description though not used as human food, such as loam or iron, cannot be lawfully sold, according to 'us,' for another of its kind with any excess in one over the other.

Reba of excess and *Reba* of delay.

When both the qualities of quantity and sameness of kind are found in the commodities exchanged, any excess or any delay in the delivery of one of them is unlawful; when one only of the qualities is present and the other absent, excess is lawful but delay is forbidden; when both are absent, excess and delay are both lawful.

What things are measureable, and what weighable.

Every commodity with regard to which the Prophet pronounced excess by measure[2] of capacity to be forbidden is a measurable commodity for ever, though mankind should cease to measure it, such as wheat, barley, dates, and salt; and every commodity with regard to which he pronounced excess by weight to be forbidden remains a weighable

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[1] That is, when both the things exchanged are each less than half a *saa*; for if one of them be less and the other equal to, or more than half a *saa*, the sale is not lawful. *Kifayah*, vol. iii., p. 127. See *post*, p. 792 note. A half *saa* of wheat is the proper portion of a poor person on the festival of *Fitz* or breaking of the prescribed fast. The *saa* was 8 *rutls* of Baghdad, each of which was 20 *astars*, each of which was 4½ *miskals*. *Fut. Al.*, vol. i., p. 269. The *miskal* contained 20 *kerat*, each of which was equal to 5 grains of barley. *Kifayah*, vol. i., p. 507. The *rutl* is about 1 lb. but varies in Egypt.—*Lane's Modern Egyptians*, vol. ii., p. 378.

[2] Arab. *keil*, measuring corn. It seems also to be a measure for dry or liquid goods, but I have not been able to ascertain its quantity.

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commodity, though mankind should cease to weigh it, such as gold and silver. Commodities with regard to which he made no express declaration, but which are known to have been estimated by measure of capacity in his time, retain for ever their quality of measurable commodities, though mankind should in our times sell them by weight; and all commodities with regard to which he made no express declaration yet which are known to have been estimated by weight in his time, remain weighable commodities for ever, though mankind in our age should be in the custom of selling them by measure. Commodities with regard to which there is no declaration of the Prophet, nor knowledge of the custom of mankind in his time, are to be regarded as measurable or weighable, according to the custom of men in our own times; and if by present custom the commodities are both measured and weighed, they are to be regarded as both measurable and weighable.

Equality by weight not sufficient for measureable commodities, nor equality by measure for weighable.

It follows from the above, that if wheat were sold for an equal quantity of its kind by weight, or gold for an equal quantity of its kind by measure, the sale would not be lawful, whatever the present custom may be. And if any measurable commodity be sold by weight, or any weighable commodity by measure, the sale is not lawful, though the thing sold should be equal to that for which it is sold, if the equality be not ascertained by the original legal standard. It has, however, been said by Sheikh Al-Imam, and is universally allowed, that even commodities expressly declared by the Prophet to be measurable, may be lawfully sold by weight for *dirhems*; and in like manner that commodities expressly declared by him to be weighable may be lawfully sold by measure for *dirhems*.

Things sold by *minas*, ounces, or *rutls*.

Everything sold by *minas*[1] and ounces,[2] as oil, and the like, is a weighable commodity; and if a thing which is referred to the *rutl*, or ounce, be sold by measure, and

[1] Certain weights, about 2 lbs. (according to some 6 lbs).—*Richardson.*

[2] Arab. *Awakee*, plural of *wookiyyut*, the twelfth part of a *rutl* or lb.; from 571⅓ to 576 English grains.—*Lane's Modern Egyptians*, vol. ii., Appendix.

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both the commodities interchanged be equal in measure, their qualities by measure being ascertained but the quantity by weight unknown, the sale is not lawful; but if they were equal in weight the sale would be quite valid, though one of the commodities should exceed the other in measure.

All wheat is of one kind, and all dates of one kind.

Wheat, though rotten, is of the same kind as sound wheat; so, also, wheat that is weak and grown on soil not irrigated is of the same kind as wheat upon land duly irrigated. And the Persian date is also to be considered as of the same kind, and only differing in quality from the worst description of dates.

The fruit of all palm-trees.

It is said by Aboo'l Husn al Kurkhee, that the fruit of the palm-trees are all of one kind, but with regard to other fruits, the fruit of each species of tree is a kind by itself. Thus, grapes, pears, and apples, are each of one kind, though the species of each may differ; so that the sale of one kind of grape for another kind of grape, or of one kind of pear for another kind of pear, or one kind of apple for another kind of apple, is not lawful with any excess.

Wheat cannot be sold by conjecture.

Wheat cannot be sold for wheat by conjecture, except in small quantities that are not measured;[1] and the rule applies to all other commodities estimated by measure of capacity or weight. If wheat should be sold for wheat by conjecture, and the quantities were afterwards measured and found to be equal, still the sale would be unlawful; it being a general rule that wherever similarity according to a certain legal standard is a condition of the legality of a contract, a knowledge of that similarity by the standard at the time of the transaction is also a necessary condition.

General rule as to standard.

Where grain is purchased for grain similar to it, and

[1] The case of the handful for two handfuls, on page 792, falls within this exception; but it is given in the translation of the *Hidayah*, vol. ii., p. 490, as an illustration of a general rule, that—'The sale of anything not measured out according to the legal standard, at an unequal rate, is lawful.' There is nothing to correspond with this in the printed edition of the Arabic original; and the rule appears to be too general.

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the purchaser makes delivery, but leaves what he has purchased without taking possession of it till the parties separate, there is no objection to the transaction according to us; for mutual possession at the meeting is not necessary in the sale of grain for grain, whether of the same or different kind.[1]

Rule where one of the things exchanged contains a similar of the other and something more.

If a person should sell olive oil for olives, or oil of sesame for sesame, or a sheep having wool on its back for wool, or one having milk in its udder for milk, or grape juice for grapes, or milk for butter, or a sword mounted with silver for silver, and the article which is unmixed and separate is more than that which is laid up or contained in the other, the sale, according to our authorities, is lawful; but when what is separate is less than, or only equal to, the other, or the relative quantities cannot be ascertained, the sale is not lawful (by general consent). All this implies that in the article which contains a portion similar to the other, there is some surplus or *residuum* which has value, for otherwise the sale would be unlawful. And it should be observed that for this qualification there is a report of an express saying of Aboo Huneefa.

Cotton for its thread or cloth.

According to Moohummud, the sale of cotton for its thread is lawful, and the opinion seems to be correct; and the sale of cotton cleared of its seeds for cotton not so cleared is also lawful, where it is known that the former is more than the actual cotton contained in the latter; and when cotton cleared of seeds is sold for cotton seeds, it is also necessary that the former should exceed the cotton contained in the seed. There is no objection to the sale of cotton thread for cotton cloth, or any other thread for its cloth, when the cloth is not usually weighed.

Cow and buffalo of the same kind.

So the Arabian

All flesh is referred to its origin, or the animal from whence it is taken. Hence, as the cow and buffalo are of the same kind, the sale of the flesh of the one for that of the other with any excess is unlawful. Camels also are of one kind, whether Arabian or Bactrian; and in like

[1] It seems evident that the grain is supposed to be specific and produced.

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and Bactrian camel, and sheep and goats.

manner all animals of the class *ghunum*, which comprises sheep and goats, are held to be of the same kind.

Raw for cooked flesh.

Raw flesh may be lawfully sold for that which is cooked when the quantities are equal; and any excess is forbidden, unless there be things in the cooked flesh put in for seasoning.

Milk of different animals different.

The flesh and milk of the camel, cow, sheep, and goat, are of different kinds, and one may be sold for the other with excess from hand to hand; but any delay in delivery is not allowed. So also with regard to tail fat,[1] flesh, and inside fat, being all of different kinds, part of one may be sold for part of the other in excess, but not with any postponement of delivery. Fat of the sides, or the like, follows the flesh, and is therefore different in kind from inside or tail fat. With regard to the heads, extremities, and skins of animals, they may be sold in any way, from hand to hand; but a delay in delivery is unlawful.

Flesh and fat different.

Flesh of birds.

There is no objection to the sale of the flesh of birds, one for two, from hand to hand; but any delay in delivery is unlawful; and it is reported of Aboo Huneefa that he allowed the sale of birds for bird flesh with excess, though of the same kind. One hen may be lawfully sold for two hens that have been killed, whether they be roasted or raw. Nor is there any objection to the sale of one fish for two fishes, for they are not weighed; but where the fish is of a kind that is weighed, the sale is not lawful, except similar for similar. And in every town where flesh is sold without being weighed, there is no objection to the sale of one joint for two joints;[2] and regard is to be had in this case to the state of the people of the country.

Cloth.

Cloth takes its kind from its material and qualities, though it should be comprehended under one general

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[1] Arab. *Alyut*, the *fat tail* of the Asiatic ram.—*Richardson.* The species is commonly known as the Cape sheep, and is met with in India, chiefly in the North-Western Provinces.

[2] Joints of meat are not weighed in Calcutta, even in the European bazaars.

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name, as Hurwee and Murwee, or cloth of Herat and cloth of Meroo; and Meroo cloth embroidered in Baghdad is different from that which is embroidered in Khorassan So also cloth made of flax and cloth made of cotton are of different kinds. There is no objection to the sale of cotton thread for flax, or wool for hair, in the proportion of one to two; but any delay in the delivery of one of them would render the sale unlawful, as the articles are estimated by weight. In like manner silk thread may be lawfully sold for cotton thread; but soft cotton cannot be lawfully sold for dry except similar for similar. If woollen cloth be sold for wool, and the former be in such a state that it could again be reduced to wool, equality by weight is to be regarded as necessary, but not otherwise.

No *reba* between a slave and his master.

There is no *reba* or usury between a slave and his master, unless the former be drowned in debt, in which case *reba* between them would be unlawful;[1] but debt to a more moderate extent would not have that effect. A *Moodubbur* and an *Oom-i-wulud* are in this respect on the same footing as an absolute slave; but not so a *Mookatub*. And there is no *reba* between partners, when they interchange co-partnership property; but with regard to other property there may be *reba* between them, and it is unlawful. Neither is there any objection to *reba* between a Mooslim and an enemy in an enemy's country, according to Aboo Huneefa and Moohummud; but Aboo Yoosuf thought that even in an enemy's country *reba* was unlawful. And when a *Mooslim* enters an enemy's country under protection, and sells to a *Mooslim* who had embraced the faith in that country, but had not taken refuge with us, *reba* would be lawful in the transaction, according to Aboo Huneefa; but both Aboo Yoosuf and Moohummud differed from him on this point; and if the convert had

Nor between a Mooslim and an enemy in an enemy's country.

[1] This alludes to the case of a slave who is *Mazoon*, or licensed by his master to trade, who, though he and his acquisitions are still the master's property, they are both liable for the slave's debts. His creditors have, therefore, a qualified right in his person and acquisitions, and the master dealing with his slave when he is so deeply in debt is liable to suspicion.—See Hamilton's *Hedaya*, vol. iii., p. 511.

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once taken refuge with us, and then returned to the enemy's country, *reba* in a sale to him would without doubt be unlawful. The case would be the same if both the parties had embraced the faith in the enemy's country, and had not taken refuge with us. And a sale which we should consider invalid would, if entered into between them in the enemy's country, be lawful according to Aboo Huneefa and Moohummud; but Aboo Yoosuf thought that it would be unlawful.

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CHAPTER III.

OF KURZ OR LENDING AND BORROWING FOR CONSUMPTION.[1]

Of what things *kurz* is lawful, and of what unlawful.

KURZ or loan for consumption is lawful with regard to all things that belong to the class of similars, such as articles of capacity or weight, or similars of sale, as eggs. And it is not lawful with regard to things which do not belong to the class of similars, such as animals, cloth, and dissimilars of tale. Property, however, is acquired in a thing of which possession has been taken under an invalid loan,[2] for invalid loans are transfers of property for an unknown consideration, and though, therefore, unlawful, they induce a right of property when followed by possession, in the same way as unlawful sales induce such right when followed by possession. It is also to be observed, that a thing of which possession has been taken under an invalid loan is specific for the purpose of restitution, while a thing

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[1] 'The Arabic and Latin languages both express by distinct technical terms this contract, and a deed of *areeut*, which though in their nature essentially different, are confounded in our language under the general and vague application of loan. The *mutuum* and *commodatum* of the Roman law appear to correspond exactly with the *kurz* and *areeut* of Moohummud.' Note to page 171 of the *Imameea Digest*. The *mutuum* 'exists when things *quæ pondere, numero mensurave constant*, as coined money, wine, oil, corn, *aes*, silver, gold, are given by one man to another, so as to become his, but on the condition that other things of a like kind shall be returned.'—*Smith's Dictionary*. As the identical thing lent is not returned, but another in its stead, there is an exchange of property for property, and hence the introduction of *kurz* among sales in the Moohummudan law.

[2] The loan for consumption or *kurz* is always implied, unless otherwise explained.

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possessed in virtue of a lawful loan is not specific for that purpose, even though it be still subsisting in the hands of the borrower. It is optional with him, however, to make restitution of the actual thing, or a similar to it at his pleasure. In every case where a loan is unlawful, it is also unlawful to make any use or advantage of the thing lent. The sale of it, however, is lawful.

Any use of an unlawful loan is unlawful.

Bread may be lawfully borrowed by weight, but not by the piece, according to Aboo Yoosuf, and the *futwa* is in accordance with his opinion; but he saw no necessity, and gave no sanction, according to one authority, for a loan of wheat and flour by weight, or of dates in that way, even in a place where they are usually weighed. According to another report, however, he considered that flour may, on a favourable construction of law, be lawfully borrowed by weight where agreeable to the practice of men, and the *futwa* is in accordance with this view.

How bread, wheat, and flour may be borrowed.

It is lawful to borrow gold and silver by weight, but not by tale. With regard to *dirhems* of which one-third only is silver and two-thirds are copper,[1] a man need be under no apprehension in borrowing them by tale when they pass current among men; but when they are not currently received except by weight, then they can be borrowed only by weight, while if two third parts of the *dirhems* are silver and one part only is copper, they cannot be lawfully borrowed except by weight, though commonly received by mankind in sales by tale. And the rule is the same with regard to *dirhems* which are half silver and half copper, which cannot therefore be lawfully borrowed except by weight.

Gold and silver may be borrowed by weight only.

If a person lend on credit, or after a loan enter into a stipulation for deferring its payment, the original credit and the stipulation are void, and repayment may be demanded immediately.[2] When, however, a person directs

Stipulation to suspend the repayment

[1] For the different kinds of *dirhems*, see *M. L. S.*, p. 138.

[2] As *kurz* is an exchange of property for property, and the articles lent are of the class of similars, a stipulation for suspending repayment would amount to the *reba* of delay. See *ante*, p. 792.

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by his will that a loan shall be made to a particular individual for a month, for instance, the postponement of the payment is lawful. There is no difference between a credit given before, and one given after the destruction of the thing lent. There is a device, however, by which credit may be lawfully allowed for the repayment of a loan; it consists in the borrower transferring the obligation of his debt to a third party to whom the lender may lawfully give credit, and the credit so given is obligatory on him. of a loan is void.

Moohummud says, in his book of *Surf*, that Aboo Huneefa abhorred every loan from which any advantage is derived to the lender.[1] Al Kurkhee, however, considered that the objection is applicable only to cases where the advantage is made an express stipulation of the loan; and that in all others, as, for instance, a case where the borrower makes a return of better things than he was liable for, there need be no apprehension in availing oneself of the proffered advantage. But Khussaf says that he liked not this distinction, and Al Hulwan, that it is positively unlawful; while Moohummud has recorded that it was abhorred by the ancients; but he has also stated in another place, that there is no objection to the lender accepting a present from the borrower when it is not made a condition of the loan, which shows that he himself departed from the opinion of the ancients. But the Sheikh ool Islam, Khwahir Zaduh, suggests that the opinion of the ancients may be reconciled with that of Moohummud, by supposing that the former had reference to a case where the advantage to the lender is made an express condition of the contract, which is allowed to be abominable, without any difference of opinion. And there seems to be no doubt that a present may be lawfully accepted from a borrower when it is known that he does not give it from any view to the forbearance of the loan, but from a regard to propinquity or friendship subsisting between the parties, particularly when the borrower is distinguished for the Stipulation of any kind of advantage to the lender is abominable.

[1] It is stated in the *Hidayah*, that the Prophet prohibited loans productive of any advantage. Vol. iv., p. 1085; Translation, vol. iv., p. 119.

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liberality of his disposition. When, on the other hand, there is any apprehension that the present may be given with a view to forbearance on the part of the lender in demanding repayment of the loan, the acceptance of the present ought to be carefully avoided. And where there are none of the reasons above mentioned for the present, the situation is one of difficulty, and avoidance of the present is proper until the borrower give an express assurance that he has no view to any forbearance in the matter.

Repayment in articles of a better quality than those borrowed is lawful, but not with any excess in quantity, unless it be very trifling.

When a debtor repays his debt in things better than he received, the creditor is not obliged to receive the repayment; though if he accept, the payment is lawful. And when there is a term for payment, and the debtor pays within the term, the creditor may be compelled to receive it. A trifling excess by weight in repayment, as a *danik*[1] in the hundred, is lawful; but an excess amounting to one or two *dirhems* in that number would not be lawful; and there is a difference of opinion with regard to an excess of half a *dirhem*, which according to one authority ought to be returned.

Sooftujah, or bills of exchange.

Sooftujah[2] is abominable, unless the money be borrowed in absolute terms, and payment is made in the other city without any stipulation to that effect.

Surrender of lands to a lender, to receive its profits till repayment of a loan, is abominable.

A person says to another, 'Lend me a thousand *dirhems*, on condition of my lending you this my land, that you may cultivate it while the *dirhems* remain in my hands,' and he cultivates the land; in such circumstances he is not actually bound to distribute the produce in alms, but the transaction is abominable.[3]

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[1] A small silver coin, the sixth part of a *dirhem*.

[2] Stated in the *Kamoos* to be 'the lending of money to a person who has assets in the country where the lender's family resides, on condition of its being repaid there, and thus guarding against the dangers of the road.'—Note to p. 180 of the *Imameea Digest*. See also Hamilton's *Hedaya*, vol. iii., p. 244.

[3] A loan of this kind was sometimes superadded to a pledge, and was a recognised device for securing to the pawnee some advantage from the pledge. It is thus explained in the book on *Heela* or devices,

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When a person has borrowed *fooloos* or Adawlee *dirhems*, and they cease to be current, he is bound, according to Aboo Huneefa, to make repayment of similars though non-current; while according to Aboo Yoosuf, he is liable for their value on the day that he received the loan, and, according to Moohummud (whose opinion has been adopted), for their value on the last day that they were current. Some of the learned, however, of our time have given the preference to the opinion of Aboo Yoosuf, which appears to be the most proper in our times.

Loan of *fooloos* or *dirhems* that lose their currency.

A person having lent Bokhara *dirhems* in Bokhara meets the borrower in another city where they are not to be obtained; in such circumstances the lender ought, according to Aboo Huneefa and Aboo Yoosuf, either to allow the borrower time to go and return, trusting him in the meanwhile and taking a surety, or to receive the value of the *dirhems*. A person borrows articles of weight or of capacity, and when redemanded they are not procurable; the lender must wait for the return of the proper season, according to Aboo Huneefa, whose opinion has been approved. A person borrows grain in a city where it is cheap, and meeting the lender in a city where it is dear, is seized by the latter who demands his right; the borrower cannot, however, be detained, and the lender should be directed to trust him till he has an opportunity of rendering the grain in the city in which it was borrowed.

Miscellaneous cases.

One Christian lends wine to another, and afterwards embraces the faith of *Islam*, his right in consequence

in the *Futawa Alumgeeree*, vol. vi., p. 606: 'A person wishes to take a pledge from another, and to derive some advantage from it, as, for instance, the pledge being land, he wishes to sow it; or a house, to occupy it. The device in this case is to take a pledge, obtain possession, and then take an *areeut* of the same thing from the pledger. When this is done, and permission is granted to the pawnee to make use of the thing, he may lawfully avail himself of this advantage; and the *areeut* does not cancel the pledge, which, however, is in abeyance during the subsistence of the *areeut*, so that, though the pledge should perish, the debt would not be extinguished, and after the desired advantage has been obtained, the pledge revives as before. This is contrary to the case of a lease, which would extinguish the pledge.' With regard to the last point, see *ante*, p. 221.

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falls to the ground; but if the borrower become *Mooslim* he must restore the value, according to Moohummud, and one report of Aboo Huneefa's opinion also.

Composition by the borrower for less than the amount of the loan.

A person to whom a thousand *dirhems* is due by another on loan, enters into a composition with him for a hundred, payable at a fixed term; the abatement is valid, but the hundred is presently payable unless the borrower deny the loan, in which case the hundred would not be due till the expiration of the term.

Purchase by him of the thing borrowed.

A person lends another a *koor* of wheat, and the borrower then purchases it from the lender for money; the transaction is lawful, whether the wheat be still subsisting in the hands of the borrower or not. And when the money is paid at the meeting, the purchase retains its validity; but if the money be not paid at the meeting, the purchase becomes void. The case would be different if a *koor* of wheat were also due to the borrower by the lender, and both the parties should sell to each other what was due to him for what was due by him; for here the transaction would be lawful, though they should separate.[1] When the purchaser pays his money at the meeting and afterwards finds a defect in the *koor*, he is not at liberty to return it for the defect, but having been liable only for a similar to the article borrowed, he is entitled to compensation for the defect out of the price. And if the purchase be for a *koor* similar to what is obligatory on the borrower, the transaction is lawful when the *koor* is specific; but not lawful when it is indeterminate, unless possession take place at the meeting. But if the purchase be of the identical *koor* borrowed, the transaction is void, and being so does not effect any dissolution of the loan; while if the borrower sell back to the lender the identical *koor*, the sale is lawful.

Disposal before possession.

In a valid loan free use and disposal of the subject of loan before possession of it is lawful.

By whom loans are unlawful.

Loans by the following persons are unlawful, viz., a slave engaged in trade, a *Mookatub*, a youth under age,

[1] Because possession is implied.—*M. L. S.*, page 126.

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and an insane person. When loans are made to these persons and the thing lent is destroyed, opinions differ as to the responsibility of the parties; but if the lender find the specific thing which he lent to any of them still subsisting in his hands, there is no doubt that he has the best right to it.

Appointment of an agent to borrow is unlawful, but a messenger may be employed for the purpose.

A person says to another, 'Borrow for me from such an one ten *dirhems*,' and he does so, takes possession, and declares, 'I delivered them to my principal,' he is personally liable for the property, and is not to be believed as against his principal. And if a person send a letter to another with a messenger requesting him to send so many *dirhems* 'as a loan from you against me,' and he sends them by the person who delivers the letter, they do not become the property of the writer until they actually reach him, according to one report of an opinion of Aboo Yoosuf. But if one should send a messenger to another, saying, 'Send me ten *dirhems* in loan,' and he should answer, 'Yes,' and send them accordingly, the sender of the messenger becomes liable if he admit the receipt by the messenger. And if one send a person to borrow a thousand *dirhems*, and they are lent to him and perish in his hands, the sender is liable if the messenger had said, 'Lend to such an one (the sender);' but if the messenger had said, 'Lend to me for such an one,' the messenger himself would alone be answerable. The reason is, that while an agent may be lawfully appointed to lend he cannot be lawfully appointed to borrow; but if a messenger be employed for the latter purpose it is lawful. If, then, a person appointed to borrow employ language that indicates that he is acting as a messenger, the loan to him is binding on his principal; but if he employ language that indicates he is acting as an agent, as when he refers the act to himself, he becomes a borrower for himself, and is entitled to the money which he has received, and may therefore refuse to render it to his principal. A person having borrowed ten *dirhems* sends his slave to receive them from the lender, who insists that he gave them to the slave, and is supported in his assertion by the acknow-

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ledgment of the slave, who further alleges that he paid them to his master; the master, however, denies the receipt, and his word is entitled to preference, so that he is in no wise liable, and the lender cannot even have recourse against the slave.

Case of lender being directed by the borrower to apply the thing lent to borrower's use.

A person borrows a *koor* of wheat from another, and directs him to sow it on the borrower's land; the loan is valid, and the borrower becomes possessed of it as soon as it is applied to his property. But if one should borrow money and desire the lender to throw it into the water, which he does, the borrower is in nowise liable, according to Moohummud.

Areeut.

An *areeut*[1] or loan for use of everything of which *kurz* or loan for consumption is lawful, is in fact a *kurz*, and an *areeut* of anything of which *kurz* is not lawful remains an *areeut*. A person by whom a thousand *dirhems* are due gives to the creditor some *deenars*, which he desires him to change and take his right out of them; he receives the *deenars* and they perish in his hands before the change is effected; in such circumstances they perish as the property of the person who delivered them. And the result is the same when the receiver of the *deenars* has actually made the change and received *dirhems* for them, but the *dirhems* happen to perish in his hands before he has taken payment of his right out of them. If he should first take his right out of them and they should then perish, the loss would be his own. And if the debtor in delivering *deenars* to his creditor, say, 'Take them in payment of your right,' and he takes them, the responsibility for loss is with the creditor; or if the debtor say, 'Sell them for your right,' and he sells them for *dirhems* equal to his

Case of a debt in *dirhems* being paid by delivery of *deenars*.

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[1] *Areeut* signifies *an investiture with the use of a thing without a return* (*Hamilton's Hedaya*, vol. iii., p. 277). It is the loan of a thing to be identically returned, as a book after perusal (*Ibid.*, note p. 283), and corresponds exactly with the *commodatum* of the Roman law, which was 'distinguished from *mutuum* in this, that the thing lent is not one of those things *quæ pondere numero mensurave constant*, as wine, corn, etc., and does not become the property of the receiver, who is therefore bound to restore the same thing.'—*Smith's Dictionary.*

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demand, and takes possession, he becomes seized of his right by the possession after the sale.

Lender cannot resume the identical thing lent.

If a lender should desire to take back the actual *koor* that he lent, he has no right to it, and the borrower may insist on giving another.

Case of a number of persons borrowing and desiring that payment may be made to one of them.

Twenty men come and borrow from a person, desiring him to pay the money to one of their number, which he does; he cannot, however, demand from that person more than his share. From this case another point may be inferred, viz. that the appointment of an agent to take possession of a loan is valid, though the appointment of one to borrow is not so.

Bye-al-wufa, or mortgage.

[1] The sale which is in use among men in our times as a contrivance for *reba*, and to which they have given the name of *Bye-al-wufa*,[2] is in fact a pledge, and the thing sold is in the hands of the purchaser as a pledge in the hands of the pawnee; he is not its proprietor, nor is he free to make use of it without the permission of its owner; he is responsible if he eat or destroy the fruit of a tree so sold to him, and his debt, when the *wufa* is for a debt, is extinguished if the thing should perish in his hands; but he is not responsible for the loss of an increase if it should perish without his act; and the seller may reclaim the thing sold when he pays his debt.

According to us, there is no difference between this transaction and a pledge in any of its effects or consequences.[3] To this effect, decisions have been given by the Siyyid Aboo Shoojaa of Samarcand, and the Kazee Alee As Soghdee in Bokhara, and many other learned men. And the form of the transaction is this: the seller

[1] From *Fut. Al.*, chapter xx., vol. iii., p. 268, of abominable sale. As there are different opinions with regard to the legality of the *Bye-al-wufa*, I think it proper to give all that occurs on the subject in the *Futawa Alumgeeree*. This sale is the common form of mortgage in use in India, where it is usually styled *Bye-bil-wuffa*.

[2] *Wufa* means the performance of a promise, and the *Bye-al-wufa* is a sale with a promise to be performed. The nature of the promise is explained a little further on.

[3] This is the opinion of one section of the learned, who think that the transaction is to be regarded in all respects as a pledge, according to the intention of the parties, who, though they say sale, mean pledge. *Kifayah*, vol. iii., p. 820.

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says to the purchaser, 'I have sold you this thing for the debt due to you by me, on condition that when I pay the debt the thing is mine;' or thus: 'I have sold you this for so much, on condition that when I give up to you the price, you will give up to me the thing.' And what is valid is, that the contract which passes between them, if it be in words of sale, is not a pledge.[1] It is then to be considered if the two parties have mentioned a condition of cancellation in the sale, and if so, the sale is invalid. And even if they should not have mentioned this in the sale, but have both, in expressing themselves, used the word sale with a condition of *wufa*, or have expressed themselves as in the case of a lawful sale, but with the meaning that the sale is not to be binding or obligatory, the result is the same. Where, again, sale is mentioned without any condition, and the stipulation is then mentioned after the manner of a mutual promise,[2] the sale is lawful, and the *wufa* binding as a promise.

A case is given in the *Nasfeeut* of a person who sold a mansion for a fixed price by *Bye-al-wufa*, and mutual possession having been taken, then let the mansion to the purchaser on the conditions of a valid *ijaruh*, or lease, under which possession was taken. In such circumstances, it being asked if the purchaser was liable for rent, the answer was in the negative.[3] A person sells an orchard

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[1] This is the opinion of another section of the learned, who consider that the transaction should be treated as a sale in some respects; that is, to the extent of conferring on the purchaser the right of using the property, but not that of selling or giving it away.—*Hidayah* as explained by the *Inayah*, vol. iv. p. 152.

[2] Arab. *Muwaidut*. In an authority cited in the *Kifayah* (vol. iii., p. 820), in nearly the same terms, instead of this word the word *meedd* is used, which is an inflection from the same root, and is commonly employed in India to signify the time or fixed period for the performance of a promise. And after the words 'the sale is lawful,' the passage proceeds thus: 'and the *wufa* is binding at its fixed period, for periods in engagements are binding; and this period is so, from regard to the necessities of men.'

[3] If a person should borrow *dirhems* and deliver an ass to the lender, to use him for two months till the *dirhems* were repaid, or a

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to another by *Bye-al-wufa*, and mutual possession having been taken, the purchaser makes an absolute sale of it to a third party, to whom he gives delivery, and then withdraws; in such circumstances, the original seller may litigate the matter with the third party, and reclaim the orchard from him. And in like manner, if all the parties should die leaving heirs, the heirs of the original proprietor may require a release of the property from the hands of the heirs of the second purchaser, who may then have recourse to the heirs of the first purchaser for the price paid to him to the extent of the assets in their hands, and the heirs of the first purchaser may then reclaim the restoration of the property, and retain it on account of the debt to their ancestor until that be paid. In the *futawa* of Aboo 'l Fuzl, a case is mentioned of an orchard which was in the hands of a man and a woman, and the latter having sold her share to the former on condition that he should restore it to her on repayment of the price, and the man having subsequently sold his own share, it was asked if the woman had a right of pre-emption, and the answer was, that if the sale was a *maamilut* [1] sale, she had such a right, whether her share of the orchard were in her own hands or in the hands of the man. Thus in the *Moheet*. And in the *Atabeeah* it is said that a *Bye-al-wufa* and a *Maamilut* sale are one.[2]

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mansion to inhabit it, the case would be like an invalid lease, and if the lender should make use of the ass or mansion, he would be liable for the time of the use, and there would be no pledge. *Fut. Al.*, v., p. 633.

[1] From *Umul*, practice.

[2] The *Bye-al-wufa* is called in the *Hidayah*, *Mooutad*, which means practised or accustomed, viz. in Samarcand and neighbourhood, as explained in the *Kifayah*, vol. iii., p. 820. There are four different opinions regarding the *Bye-al-wufa*. The first treats it as a pledge, as already mentioned; the second treats it as a lawful sale; of this opinion was the author of the *Hidayah*, as inferred by the commentator in the *Inayah*, from his referring to the *Mooutad* as a lawful sale. It may be observed in passing, that the translation of the *Hidayah* (vol. iii., p. 455), gives but an imperfect rendering of the Arabic text. According to the third opinion, the *Bye-al-wufa* is an invalid sale; and

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according to the fourth, it is entirely void. *Inayah*, vol. iv., p. 153–154. The *Bye-al-wufa*, as now in use in the British territories in India, and sanctioned by the regulations of the British Government, contains a stipulation, that if the sum borrowed be not repaid (with or without interest) by a fixed period, the sale shall become 'absolute;' and it is stated in the preamble to Regulation I. of 1798, that it had long been a prevalent practice to lend money on the mortgage of landed property with such a stipulation. And it is probable that it was the prospect of forfeiture, in the event of non-payment at the fixed period, that originally led to its adoption as a device for evading the prohibition against *Reba*.

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